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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 854

A. L. A. SCHECHTER POULTRY CORPORATION, Schechter Live Poultry Market, Joseph Schechter, Martin Schechter, Alex Schechter, and Aaron Schechter, petitioners.

v.

UNITED STATES OF AMERICA

No. 864

UNITED STATES OF AMERICA, PETITIONER

v.

A. L. A. SCHECHTER POULTRY CORPORATION, Martin Schechter, Alex Schechter, and Aaron Schechter

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 131) on the demurrer to the indictment is reported in 8

F. Supp. 136. The opinion of the Circuit Court of Appeals (R. 1648) and the concurring opinion by Circuit Judge Learned Hand (R. 1660), in which Circuit Judge Chase joined, have not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 4, 1935. (R. 1664.) Petition for writ of certiorari in No. 854 was filed on April 8, 1935, and in No. 864 on April 11, 1935. Both petitions were granted April 15, 1935.

Jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the following provisions contained in the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York, approved by the President under the National Industrial Recovery Act, are, as applied to operators of wholesale slaughterhouses, within the power of Congress under the Commerce Clause of the Constitution: (1) prohibition of sale of poultry unfit for human consumption; (2) prohibition of sale of uninspected poultry; (3) requirement of "straight killing," i. e., that poultry be sold only on the basis of the run of the coop or on the basis of official grade; (4) requirement of a weekly report showing the range of daily prices and the volume of sales during the

week; (5) requirement of a minimum wage of fifty cents per hour and a maximum of forty-eight hours of labor per week for any slaughterhouse employee; (6) prohibition of sales to unlicensed dealers.

2. Whether the Act, or the provisions enumerated above, constitute a deprivation of liberty or property without due process of law in contravention of the Fifth Amendment to the Constitution.

3. Whether the National Industrial Recovery Act, in authorizing the President to approve codes of fair competition, is an unconstitutional delegation of power by Congress.

4. Whether, if the question is properly raised, Section 3(f) of the Recovery Act is invalid because of indefiniteness; and whether the trial court committed reversible error: (1) In overruling a demurrer alleging that the indictment was too general, vague, indefinite and uncertain; (2) in denying a bill of particulars; (3) in holding that there was sufficient evidence to warrant conviction, including particularly conviction on a count charging a conspiracy to violate the National Industrial Recovery Act and the Code; (4) in excluding certain evidence; (5) in reading the indictment to the jury; (6) in charging the jury as to the meaning of effect upon interstate commerce; (7) in accepting the verdict on the conspiracy count as a unanimous verdict; (8) in the imposition of fines upon the defendants.

STATUTE AND CODE PROVISIONS INVOLVED

The pertinent provisions of the Act of June 16, 1933, c. 90, 48 Stat. 195 (U. S. Code Sup. VII, Title 15, Secs. 701 *et seq.*), known as the National Industrial Recovery Act, are set forth in the Appendix, pp. 1–12.

Background and Legislative History.—This Court has had frequent occasion to notice the crisis which confronted the nation in the spring of 1933 (*Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344; *Home Building & Loan Ass'n.* v. *Blaisdell*, 290 U. S. 398) and which moved the Congress to adopt the National Industrial Recovery Act. References to the nature and extent of the economic crisis are to be found at pages 87–91 of the brief. Similarly, pertinent portions of the legislative history are referred to in the Argument.

Pertinent provisions of the Recovery Act.—The Recovery Act, approved June 16, 1933 (c. 90, 48 Stat. 195), is entitled "AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes." Title I is entitled "Industrial Recovery" and Title II (not material here) is entitled "Public Works and Construction Projects." Section 1 of the Act states:

> A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare,

> and undermines the standards of living of the American people, is hereby declared to exist.

This section then states the policy of Congress in enacting this Act to be as follows:

> It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

Sections 2 (a), (b), and (c), entitled "Administrative Agencies", authorize the President to establish such agencies and to appoint such officers and employees as he may find necessary to effectuate the policy of Title I, to delegate any of his functions and powers under that title to such officers, agents, and employees as he may designate or

appoint, and to establish an industrial planning and research agency to aid in carrying out his functions under that title; and provides that Title I shall cease to be in effect, and any agencies established thereunder shall cease to exist, at the expiration of two years after the date of the enactment of the Act, or sooner if the President shall by proclamation, or the Congress shall by joint resolution, declare that the emergency recognized by Section 1 has ended.

Section 3 is entitled "Codes of Fair Competition." Section 3 (a), pursuant to which the Live Poultry Code was approved by the President, reads as follows:

> Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided,* That such code or codes shall not permit monopolies or monopolistic practices: *Provided further,* That where

such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

Section 3 (b) declares that the provisions of a code approved by the President shall be the standards of fair competition for the trade or industry in question, and provides that any violation of such standards "in any transaction in or affecting interstate commerce" shall be deemed an unfair method of competition in commerce, within the meaning of the Federal Trade Commission Act.

Section 3 (c) vests the several District Courts of the United States with jurisdiction in equity to restrain violations of any code approved under Title I.

Section 3 (f) provides as follows:

When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision

> thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

Section 7 (a) provides that:

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

The adoption of the Live Poultry Code.—An application for a code for the live poultry industry in and about New York City was made by a number of trade associations representing "about 90% of

the live poultry industry by members and by volume of business" (R. 6 7, 10, 1586). On January 6, 1934, the Secretary of Agriculture[1] issued a notice of a hearing to be held on January 17, 1934 for the purpose of considering the proposed code. The notice of hearing stated that all interested parties would have an opportunity to be heard (Ex. 19, R. 1580; Appendix, pp. 60 61). Copies of the notice were mailed to members of the industry, including petitioners (Ex. 20, R. 1580). Hearings were held on January 17 and 18, before representatives of both the Department of Agriculture and the Administrator for Industrial Recovery, the latter participating, however, only with respect to the proposed labor provisions. (See Department of Agriculture, Agricultural Adjustment Administration, Transcripts of Hearings on Proposed Code for Live Poultry Industry.) The witnesses at the hearings included representatives of the associations submitting the code, and of retail associations, labor unions and farmers' associations, as well as individual members of the industry.[2] During the hearings[3] the provisions of

[1] The Secretary of Agriculture had general jurisdiction of certain codes including that for the live poultry industry, the Administrator for Industrial Recovery being vested as to such codes with jurisdiction only over labor provisions. See note 7, *infra*, p. 12.

[2] A list of the witnesses with their affiliations, taken from the transcripts of the hearings, is printed in the Appendix, pp. 72–75.

[3] Copies of the transcripts of hearings were obtainable from the reporter upon payment of his charges. They are

the proposed code were taken up one by one for criticism and suggestion.

Upon the completion of the hearings the code was examined in the Department of Agriculture and the National Recovery Administration, and reports[4] were submitted to the Secretary of Agriculture and the Administrator for Industrial Recovery. On the basis of the hearings and the reports, the code was redrafted, but substantial changes were made only in the labor and administrative provisions.[5] The trade associations which had submitted the original code filed assents to the new labor and administrative provisions. (See National Recovery Administration Record for the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York, Vol. II.)

On April 10, 1934, the Secretary of Agriculture and on April 9, 1934, the Administrator for Industrial Recovery transmitted the code to the President, accompanied by their reports[6]

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open to public inspection at the Department of Agriculture and the National Recovery Administration.

[4] The reports to the Secretary are recorded in the files of the Department of Agriculture; those to the Administrator are contained in Vol. II of the National Recovery Administration Record for the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York.

[5] The report of the Administrator for Industrial Recovery dealt only with wages, hours of labor and other labor provisions of the Code (R. 9–15; Appendix, pp. 28–33).

recommending its approval and finding that it complied with all requirements of the Act (R. 5–15, Appendix, pp. 25–33). A stenographic report of all evidence introduced at the hearings was also transmitted to the President (R. 6, Appendix, p. 25). The report of the Secretary of Agriculture found specifically, *inter alia*, that the associations submitting the code were truly representative of the industry and that they imposed no inequitable restrictions on admission to membership, that the code was not designed to eliminate or oppress small enterprises or to promote monopolies, that it would tend to effectuate the policy declared in Section 1 of the Act, that the provisions of the code establishing standards of fair competition were regulations of transactions in or affecting the current of interstate and foreign commerce and were reasonable, and that due notice and opportunity for hearing had been afforded interested parties (R. 6–9, Appendix, pp. 26–28).

On April 13, 1934, the President, by Executive Order, approved the code,* having first made the findings required by the statute. (R. 3–5, Ap-

*The code was immediately printed by the Government Printing Office. Copies could be obtained upon request from the National Recovery Administration and the Department of Agriculture. A copy could also be obtained from the Superintendent of Public Documents, upon payment of a nominal fee.

On May 15, 1934, a meeting of the live-poultry industry was held in New York City at which the code was explained and the announcement made that its administration and enforcement would begin immediately (R. 492–493). Three

pendix, pp. 23–24.) These findings are set forth and discussed later, *infra*, pp. 138–140.

The Live Poultry Code: The provisions of the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area In and About the City of New York (hereinafter referred to as the Code), as well as the President's executive order approving the Code and the reports to the President on the Code by the Secretary of Agriculture and by the Administrator for Industrial Recovery,[1] are set forth in full in the first count of the indictment (R. 3–43), were introduced in evidence (R. 540; Ex. 26, R. 1586) and are reprinted in the Appendix at pages 23–59. The following are the Code provisions directly involved:

ARTICLE III—HOURS

SECTION 1. No employee shall be permitted to work in excess of forty (40) hours in any

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of the petitioners were present at the meeting (R. 637–638). One of them had acted as secretary of a marketmen's meeting previously held to elect representatives to the Industry Advisory Board of the Code. (R. 539.)

[1] By virtue of prior Executive orders delegating authority to the Secretary of Agriculture and to the Administrator for Industrial Recovery, the former official was vested with general jurisdiction over certain codes, including that for the poultry industry, and the latter had jurisdiction over the labor provisions of these codes. (Executive Orders Nos. 6182, 6205–A, 6207, 6345, 6551, dated, respectively, June 16, 1933, June 26, 1933, July 15, 1933, July 21, 1933, October 20, 1933, January 8, 1934. See Appendix, pp. 13–22.) The hearings on codes where there is such two-fold jurisdiction are held before representatives of these two officials.

one week, except as herein otherwise provided. * * *

* * * * * *

(b) Slaughterhouse employees provided that they shall not work more than forty-eight (48) hours in any one week.

ARTICLE IV.—WAGES

SECTION 1. No employee shall be paid in any pay period less than at the rate of fifty (50) cents per hour * * *.

ARTICLE VII.—TRADE PRACTICE PROVISIONS

The following practices shall be deemed to be and shall constitute unfair methods of competition on the part of members of the industry and are hereby prohibited.

* * * * * *

SEC. 2. *Inedible products.*—Knowingly to purchase or sell for human consumption culls or other produce that is unfit for that purpose.

* * * * * *

SEC. 14. *Straight killing.*—The use, in the wholesale slaughtering of poultry, of any method of slaughtering other than "straight killing" or killing on the basis of official grade. Purchasers may, however, make selection of a half coop, coop, or coops, but shall not have the right to make any selection of particular birds.[8]

[8]Article II of the Code contains the following definitions:
"SEC. 15. The term 'straight killing' means the practice of requiring persons purchasing poultry for resale to accept

SEC. 15. *Illegal sales.*—The sale or resale of produce to any person not legally entitled to conduct a business of handling the produce of the industry (where a license or permit is required).

* * * * * *

SEC. 22. *Inspection of poultry.*—The sale of live poultry which has not been inspected and approved in accordance with the rules, regulations, and/or ordinances of the particular area.

ARTICLE VIII.—GENERAL

* * * * *

SEC. 3. *Listing sales prices.*—Every member of the industry shall submit a weekly report to the code supervisor. Such report shall show the range of daily prices and volume of sales for each kind, grade, or quality of produce sold by the member of the industry during the reported week.

STATEMENT

Petitioners in No. 854 were convicted in the United States District Court for the Eastern District of New York on 19 counts of an indictment

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the run of any half coop, coop, or coops, as purchased by slaughterhouse operators, except for culls.

"SEC. 16. The term 'culls' means poultry which is unfit for human consumption as defined in the instructions of the Chief of the Bureau of Agricultural Economics governing the inspection of live poultry at New York."

containing 60 counts.[1] One count charged a conspiracy to commit offenses against the United States by violating the National Industrial Recovery Act (hereinafter referred to as the Recovery Act) and the Code, and the other 18 counts charged violation of various substantive provisions of the Code. Upon appeal to the Circuit Court of Appeals, that court reversed the judgment of the District Court on Count 46, charging a violation of the minimum wage provisions of the Code, and on Count 55, charging a violation of its provisions regulating maximum hours of labor, and otherwise affirmed the judgment of the District Court.

This Court granted certiorari in No. 854 to review the judgment of the Circuit Court of Appeals in so far as it affirmed the conviction on 17 counts and granted certiorari in No. 864 to review that court's reversal of judgment on Counts 46 and 55. Two of the six petitioners in No. 854, namely, Schechter Live Poultry Market and Joseph Schechter, were not named as defendants in Counts 46 and 55 and are therefore not respondents in No. 864. For convenience we shall refer to the appellants in the court below as petitioners and to the United States as the respondent.

The Code was approved by the President, pursuant to authority vested in him by Section 3 (a)

[1] Of the remaining 41 counts, 19 were dismissed on demurrer (R. 130–131), 8 were dismissed on petitioners' motion at the close of the evidence (R. 1480), and the jury rendered a verdict of acquittal on 14 counts (R. 1547–1549).

of the Recovery Act, on April 13, 1934. It applies to all persons engaged in the business of selling, purchasing for resale, transporting or slaughtering live poultry, from the time such poultry comes into the New York metropolitan area to the time it is first sold in slaughtered form.[10] (R. 15–16.) The Code contains a preliminary statement of purpose and definition of terms (Articles I and II); fixes maximum hours of labor and minimum wages of employees (Articles III and IV); prohibits child labor and provides the guarantees for freedom in collective bargaining required by Section 7 (a) of the Recovery Act (Article V); sets forth the machinery for administering its provisions[11] (Article VI); prohibits specified trade practices (Article VII); and contains certain general

[10] The metropolitan area, as defined in the Code, consists of New York City, four contiguous counties in New York State, two counties in New Jersey, and one in Connecticut. (R. 19.)

[11] The Code's provisions are administered by a code supervisor appointed by the Secretary of Agriculture and the Administrator for Industrial Recovery, with the approval of an industry advisory committee of 15 members representing equitably the different branches of the industry. (R. 11, 25–29.) The Secretary and the Administrator may remove the code supervisor at any time and they may disapprove any of his acts. (R. 25, 26.) The industry was unanimous in demanding that administration be concentrated in a single individual. (R. 11.)

Each member of the industry is required to pay his pro rata share of the expenses of administration, which expenses are subject to the approval of the industry advisory committee. (R. 33–34.)

provisions relating to the requirement of reports, modification of the Code, and prohibition of monopolies or monopolistic practices (Article VIII).

Petitioners A. L. A. Schechter Poultry Corporation and Schechter Live Poultry Market, Inc., are corporations operating wholesale poultry slaughterhouse markets at 858 East 52d Street, Brooklyn, and 991 Rockaway Avenue, Brooklyn, respectively. (R. 1389, 1439, 1620.) Petitioner Joseph Schechter operated the Schechter Live Poultry Market, Inc. (R. 1439), and also participated in, and in fact dominated, the management of the A. L. A. Schechter Poultry Corporation. (R. 526–527, 530–531, 1434–1435.) The latter corporation, which was operated by Joseph Schechter's three younger brothers, petitioners Martin, Alex and Aaron Schechter (R. 1351, 1389), is the largest wholesale slaughterhouse in Brooklyn. (R. 626.)

Petitioners ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the railroad terminals serving the city (R. 1413), but occasionally they purchase from commission men in Philadelphia (R. 985–987). After the poultry is trucked to their slaughterhouse markets it is sold, usually within 24 hours, to retail poultry dealers and butchers. (R. 254, 271, 1355–1357.) Poultry so purchased is immediately slaughtered, prior to delivery, by shochtim (singular, shochet) employed by petitioners. (R. 744, 1277, 1292.)

Petitioners were convicted of violating the following trade practice provisions of Article VII: Section 2, prohibiting the sale, knowingly, of poultry unfit for human consumption (Count 2, R. 62–65); Section 22, prohibiting sale of live poultry which has not been inspected in accordance with the regulations and ordinances of New York City (Counts 4 and 5, R. 66–69); Section 14, prohibiting use of any method of slaughtering other than "straight killing" [12] (Counts 24 to 33, inclusive, R. 71–82); Section 15, prohibiting the sale of poultry to a person not licensed, as required by New York City rules, regulations, and ordinances, to conduct the poultry business (Count 60, R. 117–118).

The other Code provisions which petitioners were convicted of violating are Section 3 of Article VIII, which requires weekly reports showing the range of daily prices and volume of sales (Counts 38 and 39, R. 90–94); Section 1 of Article IV, which prohibits paying any employee less than 50 cents per hour (Count 46, R. 101–102); and Section 1 of Article III, which prohibits permitting a slaughterhouse employee to work more than 48 hours in a week (Count 55, R. 111–112). In addition, petitioners were found guilty of conspiring to violate the Recovery Act and the Code. (Count 1, R. 2–62.)

The Circuit Court of Appeals held that the power given the President to approve codes of fair com-

[12] The "straight killing" requirement of the Code is really a requirement of straight selling. (*Supra*, pp. 13–14.)

petition, subject to the restrictions and limitations imposed by the Act and within the policies which it establishes, is a constitutional delegation of legislative power. (R. 1652–1659.) The court's opinion also sets forth the facts deemed relevant to the question whether the Code provisions at issue are within the commerce power of Congress. The following are among the more important facts stated:

The dominant position of the New York market makes it "the medium by which prices for poultry throughout the country are measured." (R. 1649.) The farmer's price reflects the current New York price, and demoralization of the price structure there brings about a like situation in other markets and reduces the price received by the interstate shipper and by the farmer. (R. 1649–1650.) Dressed poultry is shipped almost exclusively to New York. (R. 1650.) It is sold through misrepresentation as to its condition and, as a result, consumers become distrustful of freshly slaughtered poultry, and its sale at low prices in competition with good poultry reduces the latter's price. (*Ibid.*) Selling uninspected poultry induces fraudulent practices, such as overfeeding, in the course of interstate shipment. (*Ibid.*) Selective killing, rather than straight killing, results in price-cutting, with consequent lower prices for interstate shippers and farmers. (*Ibid.*) The price to the consumer is determined not only by the cost of the poultry to slaughterhouses, but also by the wages

paid to their employees. (*Ibid.*) The opinion of Judge Manton also states (R. 1651):

> The appellee argues that the payment of lower wages permits the employer to sell at a lower price than if he paid higher wages. Competition is thus affected. Lower wages resulted in price cutting which in turn affects interstate commerce. It was also established that sales by wholesale marketmen to unlicensed operators, not subject to Health Department supervision, were a further cause of the industry's unfair practices.

The court concluded that the various Code provisions before it, other than those prescribing a minimum wage and maximum hours of work, were within the commerce power of Congress. (R. 1651–1652.) It stated that the majority were of the opinion that the latter type of regulation could not be sustained under this power because slaughterhouse employees were not directly engaged in interstate commerce and because the terms of their employment did not affect interstate commerce within the meaning of the commerce clause. (R. 1660.)

All other errors assigned by petitioners, appellants below, were found to be without merit. (R. 1659–1660.)

The concurring opinion concedes that "hours and wages will in fact influence the import of the fowls into the state" (R. 1662), but the limits of

Congressional power over this field of activity were said to depend upon the "size" of the effect on interstate commerce (R. 1661). The view was expressed that the *ratio decidendi* of *Stafford* v. *Wallace*, 258 U. S. 495, and *Board of Trade* v. *Olsen*, 262 U. S. 1, is not "susceptible of statement in general principles." (R. 1662.) Treating the question, accordingly, as one of degree, control by Congress of the labor performed in converting live fowl into dressed poultry, following importation of the live birds, was regarded as analogous to an exercise by it of control over "the rent of the buildings where the fowls are stored, the cost of the feed they eat while here, and of the knives and apparatus by which they are killed and dressed." (R. 1663.) Such labor was held to be "part of the general domestic activities of the state" immune from Congressional regulation. (*Ibid.*)

SPECIFICATION OF ERRORS TO BE URGED IN NO. 864

The Circuit Court of Appeals erred:

1. In holding that the Code provisions for a minimum wage of fifty cents per hour and for a maximum work week of forty-eight hours for slaughterhouse employees exceed the power of Congress under the commerce clause of the Constitution.

2. In reversing that part of the judgment of the District Court relating to counts 46 and 55 of the indictment.

SUMMARY OF ARGUMENT

I

The New York market dominates the live poultry industry. The New York price determines the prices in other markets as well as the prices at which poultry is sold by shippers and by farmers.

Each of the practices which the Code regulates, and which are here in question, affects substantially the price, the quality and the volume of live poultry shipped into the New York market. The sale of unfit poultry in competition with wholesome grades brings down the price structure for all grades, the effect being disproportionate to the relative amount of unfit poultry sold. A principal reason for the magnified effect of the sale of unfit poultry is the resulting distrust on the part of consumers, who are generally unable to distinguish good from unfit poultry before it is dressed. It is estimated that if unfit poultry could be excluded from the market by effectively prohibiting its sale in New York, there would be an increase of about 20 percent in the consumption and shipment of live poultry.

Failure to inspect, and sales to unlicensed dealers, produce the same consequences as does sale of unfit poultry, since these practices facilitate such sale. Selective killing, i. e. selling, likewise demoralizes the price structure by depressing the price for good poultry rejected from coops by the earliest purchasers at the slaughterhouse. The practice of

selective killing or selling has also tended to prevent the development of grading before shipment on the basis of quality, and so has prevented an accurate price basis for poultry as sold by farmers or other shippers.

The payment of unduly low wages, and the exaction of a long working week, contribute in the same way to the adverse effects on the price structure, and the quality and volume of live poultry shipped into New York. Because of the unusually sharp competition in this industry, and the close margin on which slaughterhouse operators work, any saving in wage costs is translated into a reduction in price. The effect is to lower the price, to induce the sale of unfit and inferior grades of poultry by competitors, and so to cause a diversion of trade and shipments from live to dressed poultry, and to induce a progressive break-down of the live poultry market.

The court below apparently proceeded on an *a priori* and erroneous distinction between the labor and other practices prohibited, with respect to their effect on interstate commerce. Although the question was treated as one of degree, the majority of the court did not suggest that there was no evidence to support the finding of the jury that violation of the labor provisions produced the same consequences as violation of the other provisions in question.

Under the decisions of this Court, the Code provisions which the petitioners violated are within

the commerce power of the Congress. *Local 167* v. *United States*, 291 U. S. 293, indicates that under the facts of this industry the practices of the wholesale slaughterhouses are so closely related to the preceding interstate movement that, from the standpoint of Federal regulation, whether under the Sherman Act or otherwise, it makes no difference what parts of their business are "in" interstate commerce, and what parts, if any, are on the fringe of such commerce but necessary to its proper functioning. Irrespective of the extent to which the slaughterhouse operators are engaged "in" interstate commerce, their practices are subject to Federal regulation. The effect of those practices on the national price and on the interstate movement of poultry is no less than the effect of the local activities in a dominant market regulated under the Grain Futures Act, or the Packers and Stockyards Act, or the Sherman Act. *Board of Trade* v. *Olsen*, 262 U. S. 1; *Stafford* v. *Wallace*, 258 U. S. 495; *United States* v. *Patten*, 226 U. S. 525. Moreover, the effect of the practices on the quality of the goods shipped and on the trustworthiness of goods in interstate commerce affords an additional basis for Federal regulation. *Thornton* v. *United States*, 271 U. S. 414; *United States* v. *Ferger*, 250 U. S. 199.

The provisions of the Code are supported also on an independent ground: they are in one aspect part of a comprehensive effort by Congress to rem-

edy the breakdown of interstate commerce which culminated in 1933. In this view practices which contribute to a sharp decline in wages, prices and employment contribute to a frustration of commerce among the States and are subject to Federal regulation in the interest of protecting and promoting that commerce. An additional basis on which the wage and hour provisions rest is that they are reasonable means for the prevention of labor disputes arising out of those subjects, and so are adapted to protecting interstate commerce from the burdens caused by labor disturbances.

II

The Recovery Act and the provisions of the Code fully satisfy the requirements of the due process clause of the Fifth Amendment. No effort was made by the petitioners to satisfy the burden of demonstrating that the Recovery Act is arbitrary, capricious, or unreasonable in its provisions. The provisions of the Code are shown to bear a substantial relation to the regulation of interstate commerce. Moreover, the restrictions imposed by the Code embody the judgment of a substantial portion of the industry as to what is both necessary and reasonable. The prohibitions against dealing knowingly in poultry unfit for human consumption, against the sale of uninspected poultry, and against the sale of poultry to unlicensed dealers, are manifestly not violative of due process under the decisions of this Court. E. g., *North American*

Storage Company v. *Chicago*, 211 U. S. 306; *Thornton* v. *United States*, 271 U. S. 414. The requirement of "straight killing" obviously imposes no burden on the slaughterhouse operator, but instead simplifies his business because it enables him to sell coops or half coops as they have been purchased by him. This provision tends to eliminate the evils resulting from the practice of selective killing and to bring about careful grading according to size and quality before shipment. The requirement of weekly reports showing the range of daily prices and volume of sales is a reasonable method of obtaining information essential to the proper administration and enforcement of the Code. Similar requirements have frequently been sustained by this Court.

No effort has been made to attack the particular minimum wage and maximum hours schedules established by the Code as arbitrary, capricious, unreasonable or unfair. The objection would seem to be based upon a general argument that the establishment of a minimum wage or maximum hours of labor is *per se* violative of due process.

The argument rests chiefly upon the case of *Adkins* v. *Children's Hospital*, 261 U. S. 525. That case, however, is clearly distinguishable. (1) The Court there found that no reasonable relationship existed between the fixing of minimum wages and the protection of the health and morals of women—a deficiency which has obviously no bearing here.

(2) The present provisions cannot be said to consider only the necessities of the employee, as was held in the *Adkins* case, for here the Act and the Code take into account the interests of employer as well as employee. (3) Finally, in that case the Court was not dealing with an emergency, as was expressly recognized in the opinion.

The procedure followed in the adoption of the Live Poultry Code fully satisfies the requirements of the Act and of due process of law.

III

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, this Court did not pass upon the validity of Section 3(a) of the Recovery Act, but indicated that it presented a different problem of delegation from that raised by Section 9(c).

Section 3(a) of the Recovery Act authorizes the President to approve codes of "fair competition" after making certain prescribed findings. The words "fair competition" set the primary standard for presidential action. Fair competition—or the antithetical expression "unfair methods of competition"—has been used in the Federal Trade Commission Act and in the Tariff Act of 1922 as a basis for administrative and judicial action. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304; *Frischer & Co.* v. *Elting*, 60 F. (2d) 711, certiorari denied 287 U. S. 649. Under the Recovery Act the President is to be guided in approving rules of fair

competition by the codes submitted by representative groups in the industries affected. There is authority for such a resort to business experience and judgment. Fair competition is given further meaning and substance by the requirement in Section 3(a) that the codes will tend to effectuate the policy set forth in Section 1 of the Act.

In many cases this Court has upheld standards no more specific than "fair competition", when given content and meaning by other sections or by the general purpose of the statute in which they were used, e. g., *New York Central Securities Corp. v. United States*, 287 U. S. 12 (public interest).

The precise degree of detail with which policies and standards must be defined varies with the subject regulated. This Court will not permit the doctrine of delegation so to restrict the power of Congress as to interfere with its ability to legislate. The leading decisions reflect the importance attributed to the necessity for the delegation. The delegation in the Recovery Act would have been necessary in normal times because of the need for a flexible procedure which could have differentiated between industries; it was especially necessary in view of the emergency confronting Congress at that time, requiring immediate action in many fields. In the words of the Court, "Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its

exertion would be but a futility" (*Panama Refining Co.* v. *Ryan, supra,* at page 421).

In other sections of the Recovery Act Congress has clearly manifested its intention that the codes contain maximum hour and minimum wage provisions. Sections 7(a), 7(c), 4(b). Since the policy of Congress as to the inclusion of such provisions is clearly expressed, the remaining question is what the maximum hours and minimum wages should be for each class of employment in each industry. The President is to determine these amounts in accordance with the limitations established by the Act. The determination of these amounts would seem clearly to be a matter of administrative detail.

Section 3(a) of the Recovery Act requires the President to make certain findings of fact as a condition of his approval of codes. In approving the live poultry code, the President made the findings required.

IV

The phrase "in or affecting interstate commerce" does not render Section 3(f) invalid for indefiniteness, since these words have been given meaning by judicial decision and, if any uncertainty as to their meaning exists, it arises from the nature of the constitutional limitations upon federal power. Such language, commonly used, as for example in the Sherman Act, has never been deemed to render a statute invalid for indefiniteness.

The several remaining specifications of error (see questions presented, *supra*, p. 3) are briefly argued; *infra*, pp. 147–173, and do not warrant repetition here.

ARGUMENT

I

THE CODE PROVISIONS WHICH PETITIONERS VIOLATED ARE WITHIN THE COMMERCE POWER OF CONGRESS

A. THE NEW YORK CITY LIVE POULTRY MARKET AND ITS RELATION TO INTERSTATE COMMERCE

An outstanding fact in the live-poultry business is the dominant position of the New York market. It is not only the largest market in the United States; it consumes more live poultry than all the other large cities combined.[1] (R. 1151, 1249.) Whereas Chicago, the next largest market, receives about 30 cars a week, and Philadelphia, Boston and Newark each from 10 to 12 cars, New York

[1] In 1933 over 73% of all original carload shipments of live poultry were unloaded in New York City. (Pier and Sprague, *Live Poultry Shipments and Receipts at New York City*, The U. S. Egg & Poultry Magazine, August 1934, p. 35.)

The great importance of New York City in the movement of live poultry is undoubtedly due to the large orthodox Jewish population in that city. The poultry eaten by orthodox Jews must be kosher-killed; that is, a deputy of the Jewish rabbi, called a shochet, must slaughter the bird. (Department of Agriculture Technical Bulletin 107 (May, 1929), *Wholesale Marketing of Live Poultry in New York City*, p. 18.) It is estimated that the Jewish population consumes about 80% of the live poultry in New York City and Italians an additional 10%. (*Ibid*, p. 17–18.)

receives from 175 to 200 cars each week. (R. 1079.) Three-fourths of the live poultry marketed there comes in by freight and the remainder by truck and express. (R. 257.) All the freight receipts and over 96% of all receipts are from other States (R. 218–219, 257); 35 States, chiefly in the Middle West and South, contributing to the movement (Exhibits 7–13,[1] R. 1557–1575).

In *Local 167* v. *United States*, 291 U. S. 293, 295, this Court briefly described the manner of handling live poultry from its origin in distant States to delivery in freshly slaughtered form to retailers in New York City. The facts are fully disclosed by the present record.

Poultry is assembled in carload quantities by shippers at shipping stations. (R. 1072, 1144.) The shippers may be large concerns, like the packers, and may operate a fleet of trucks for making collections and purchases from farmers, or they may buy the poultry from hucksters who go out with horse and wagon and collect from farmers. (R. 259–260, 1072, 1144.) The poultry is loaded in specially-constructed box cars containing 128 steel cages or decks. (R. 258, 1072.) Poultry going to

[1] These exhibits show the actual shipments by States for the years 1929 to 1933, inclusive, and for the first nine months of 1934. The truck and express shipments are stated in pounds and the freight shipments in carloads. A carload is from 17,000 to 18,000 pounds. (R. 200.)

New York is sent to commission men or receivers and arrives at the Manhattan terminal of the New York Central Railroad or at one of the four New Jersey terminals serving New York City. (R. 186–187, 262.) 75% of the freight poultry comes in at the New York Central terminal. (R. 261–262.) The commission men either handle the business on a commission basis, in which case they represent the shippers as agents and remit the proceeds of sale, less commission and freight and handling charges; or they buy the poultry for their own account. (R. 256–257.) From 60% to 75% is sold on commission. (R. 380.)

Before the poultry is unloaded at the New York or New Jersey railroad terminals, it is inspected by agents of the Department of Agriculture. And any birds found to be diseased or unfit for human consumption are destroyed. (R. 187–190, 203–204, 263–264.) Most of the truck poultry is inspected at the West Washington Market or at the Wallabout Market in Brooklyn, but there are several other points in New York City where truck poultry is regularly inspected by these agents. (R. 189.) The agent makes the inspection by physically examining about 200 birds in a car and looking over the others. (R. 203, 224–225.) The inspection, like many others, is by sample, but any car showing signs of sickness is thoroughly inspected. (R. 266, 428–429.) After a car has passed inspection, it is unloaded and the birds are placed in wooden coops, 6 feet by 3 feet. (R. 1073.)

The commission men sell to slaughterhouse operators, who are also called marketmen. (R. 254.) About 7 o'clock in the morning the slaughterhouse operators begin congregating at the New York Central freight terminal, examine the poultry and dicker with the commission men as to price. (R. 262–263, 1074–1075.) From 80% to 100% of the poultry arriving at this terminal is sold there and loaded directly on trucks of the slaughterhouse men, and the balance is taken to the commission men's stands in West Washington Market, where part is transferred directly from the commission men's trucks to those of the slaughterhouse operators. (R. 269–270.) Of the arrivals at the New Jersey terminals, about 80% is loaded there on the trucks of the slaughterhouse operators, about 5% is sold to buyers located in New Jersey, and the remaining 15% is brought to West Washington Market, where about half is transferred directly from the commission men's trucks to the trucks of the slaughterhouse operators. (R. 268–269.) The commission men make it a practice to sell the poultry taken to West Washington Market on the day of unloading from the freight cars, even at sacrifice prices. (R. 270.)

When the coops arrive at the slaughterhouse, they are stacked along the wall, and the poultry is sold the next morning to the retail stores,

butchers and poultry dealers,[3] who sell directly to consumers. (R. 255, 1355–1357.) More than half the poultry is slaughtered within 24 hours of its arrival at the terminals. (R. 271.) When a sale is made by a slaughterhouse, and before delivery, the birds are killed by shochtim, thrown into barrels, bags, or boxes, and taken to the retailer's place of business. (R. 474.)

In the metropolitan area there are about 22 commission men, about 350 slaughterhouse operators, and approximately 5,000 retail butchers and chicken dealers. (R. 249, 253–256.) Some of the slaughterhouses sell only at wholesale, that is, to retailers, others sell both wholesale and retail, and still others at retail, that is, direct to the consumer.[4] (R. 253–254.)

The underlying factors in determining the price at which commission men sell their poultry are supply and demand, but prices in actual day-to-day transactions are either arrived at by individual agreement between buyer and seller or, as is generally the case, are settled upon the basis of the current day's "quotation." (R. 1236.) This quotation is determined by a private price-reporting agency. (R. 1074–1075, 1235.) Its representative

[3] A butcher is one who sells both meats and poultry; a chicken dealer is one who sells poultry exclusively. (R. 254.)

[4] In the Code the term "wholesale slaughterhouse" means one which sells for purposes of resale an average of over 3,000 pounds a week, and all other slaughterhouses are deemed "retail slaughterhouses." (R. 18.)

appears at the New York Central terminal about nine in the morning, interviews the various commission men and ascertains the prices at which they have sold that morning, gets similar reports from buyers, and then fixes the price for the day for four or five different grades of fowl. (R. 1074–1075, 1149–1150, 1235–1236.) Some of the sales made before the quotation is announced are at a definite price and others are made on the basis of what the quotation will be.[4] (R. 1236.)

Prices in other markets are determined by the New York price, with a differential for freight and handling costs in New York. (R. 289–290, 356–357, 1094.) For example, there is a differential of 2½¢ between the New York and the Chicago market price.[5] (R. 288–289.) In some eastern markets, such as Boston and Newark, the price is based directly on the New York quotation. (R. 1237.) The New York price also determines the price at which the shipper sells, the price he pays the huckster or dealer, and the price the dealer pays the farmer. (R. 290–291, 1249–1250.) A drop in the New York price rapidly brings down the price in other markets and in the country. (R. 290–291.) As one of petitioners' witnesses said, "The paying price in the country depends

[4] *Wholesale Marketing of Live Poultry in New York City*, note 1, *supra*, p. 30, at pp. 29–32, describes the market price mechanism as it existed in 1929.

[5] The "market price" is the price paid by marketmen (or slaughterhouse operators) to commission men. (R. 1236.)

on the New York market." (R. 1249.) A Government witness, expressing the same view, said (R. 291):

> The market is made in New York City at about half past nine in the morning, and by noontime they would be knocking the price down to the farmer out in the country, on the same day.

The charts[1] on the three following pages illustrate how closely prices in other markets and shipping areas correspond to the New York price. The first shows the monthly high price for live poultry in New York City and in Chicago for the years 1926 to 1934, inclusive. The second shows the weighted average price of live poultry on the 15th of each month during the years 1926 to 1934, inclusive, in New York City and on farms in Missouri, which is the State shipping the largest amount of live poultry to New York (Exs. 7–13, R. 1557–1561). The third shows the daily price in New York City and in Louisville, Kentucky, for the months of January, February, and March, 1934.

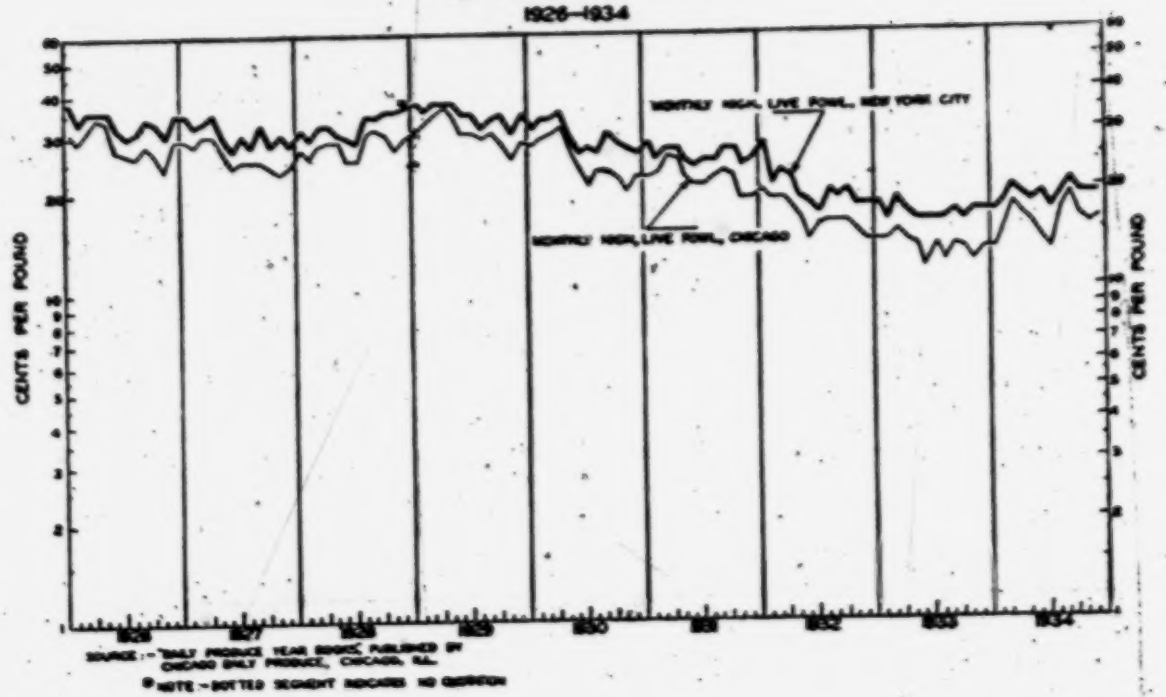
The fact that New York City daily live poultry prices are published in representative newspapers in 23 Western and Southern States (two of these newspapers carrying only a statement of the condition of the New York market) is some indication

[1] The prices on which these charts are based and the sources from which the prices were obtained are set forth in the Appendix, pp. 68–71.

MONTHLY PRICES FOR LIVE FOWL

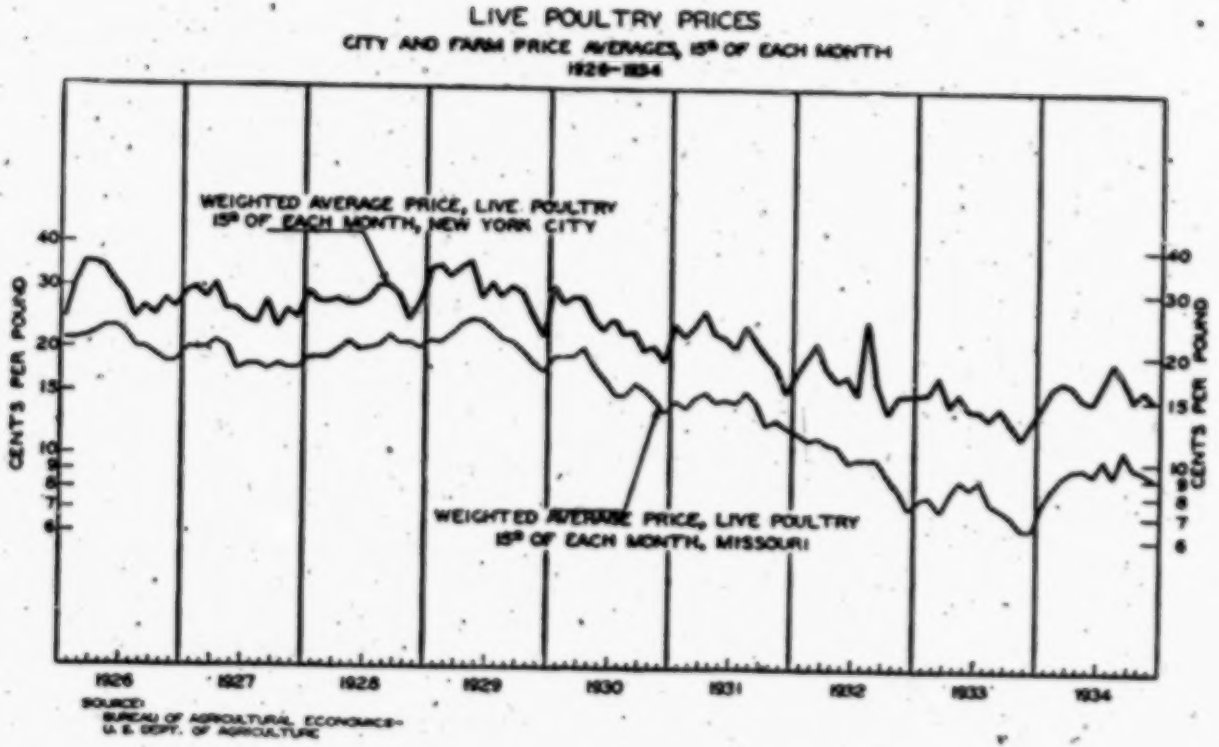
NEW YORK CITY AND CHICAGO

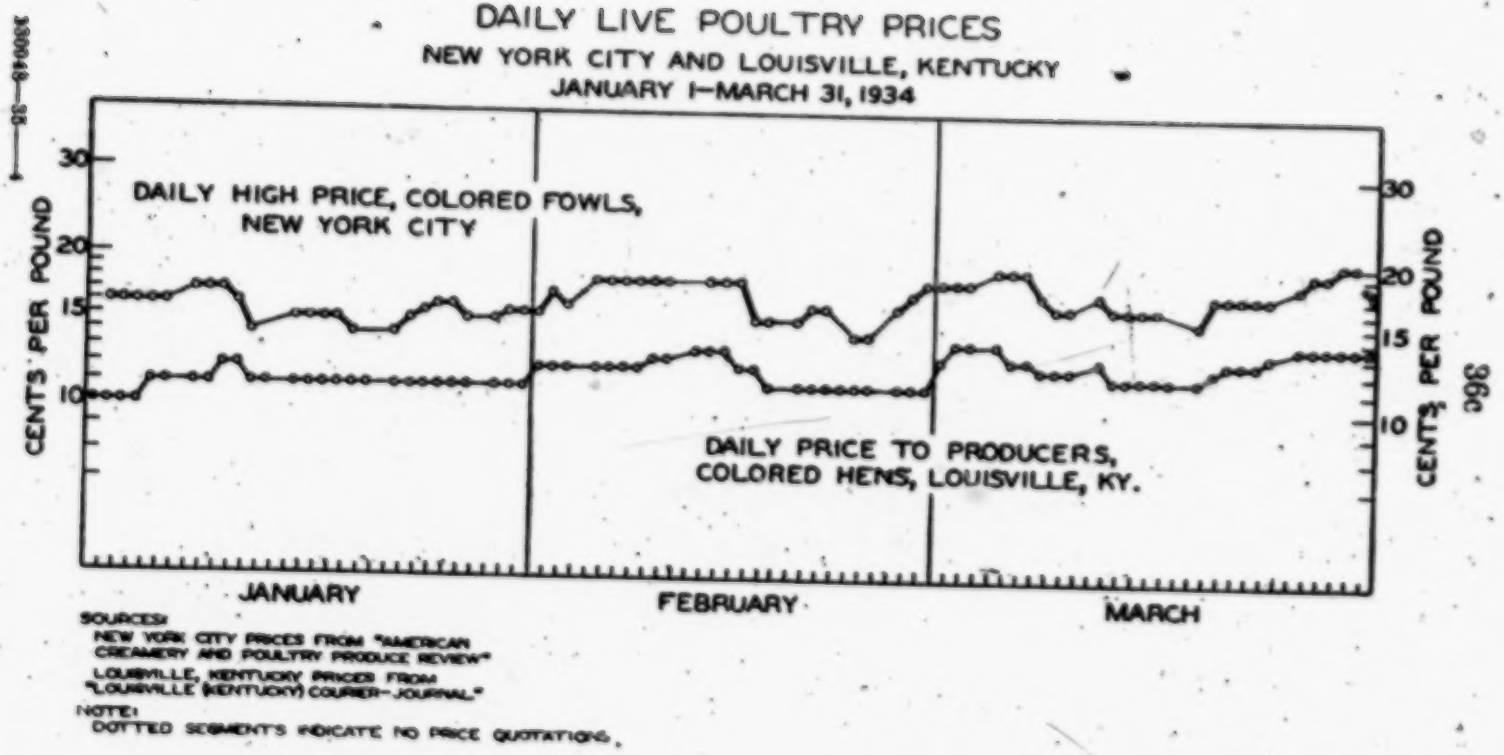
1926–1934



SOURCE:- DAILY PRODUCE YEAR BOOKS, PUBLISHED BY CHICAGO DAILY PRODUCE, CHICAGO, ILL.

NOTE - DOTTED SEGMENT INDICATES NO QUOTATION


LIVE POULTRY PRICES
CITY AND FARM PRICE AVERAGES, 15th OF EACH MONTH
1926-1934
WEIGHTED AVERAGE PRICE, LIVE POULTRY 15th OF EACH MONTH, NEW YORK CITY
WEIGHTED AVERAGE PRICE, LIVE POULTRY 15th OF EACH MONTH, MISSOURI
CENTS PER POUND
40
30
20
15
1926
1927
1928
1929
1930
1931
1932
1933
1934
SOURCE:
BUREAU OF AGRICULTURAL ECONOMICS-
U.S. DEPT. OF AGRICULTURE


DAILY LIVE POULTRY PRICES
NEW YORK CITY AND LOUISVILLE, KENTUCKY
JANUARY 1–MARCH 31, 1934
DAILY HIGH PRICE, COLORED FOWLS, NEW YORK CITY
DAILY PRICE TO PRODUCERS, COLORED HENS, LOUISVILLE, KY.
CENTS PER POUND
30
20
15
10
JANUARY
FEBRUARY
MARCH
SOURCES:
NEW YORK CITY PRICES FROM "AMERICAN CREAMERY AND POULTRY PRODUCE REVIEW"
LOUISVILLE, KENTUCKY PRICES FROM "LOUISVILLE (KENTUCKY) COURIER-JOURNAL."
NOTE:
DOTTED SEGMENTS INDICATE NO PRICE QUOTATIONS.

of the interest in and the importance of these prices over a wide area of the country.*

Poultry and eggs, together with milk and milk products, are the farmers' two year-round or "cash" crops. (R. 260.) In a poultry-raising section the farmer's poultry is like money in the

*The States and newspapers referred to are as follows:

Alabama	Montgomery Advertiser.
Arkansas	Arkansas Democrat (Little Rock).
Florida	Florida Times-Union (Jacksonville).
Georgia	Augusta Chronicle.
Idaho	Boise Capital News.
Illinois	Illinois State Register (Springfield).
Indiana	Richmond Palladium.
Iowa	Sioux City Journal.
Kansas	Wichita Beacon.
Kentucky	Louisville Times.
Louisiana	Times-Picayune (New Orleans).
Michigan	Grand Rapids Herald.
Minnesota	Austin Daily Herald.
Missouri	Springfield Leader and Press.
Montana	Great Falls Tribune*.
Nebraska	Nebraska State Journal (Lincoln).
North Carolina	Asheville Times.
Ohio	Sandusky Register*.
Oklahoma	Tulsa Tribune.
Tennessee	Chattanooga Daily Times.
Texas	San Antonio Express.
Virginia	Roanoke Times.
Wisconsin	Fond du Lac Commonwealth Reporter.

(The papers followed by a star give only the condition of the New York market. The above list represents a very brief examination of representative newspapers and is therefore by no means exhaustive.)

bank; he draws on it to pay for everyday needs, such as food and clothing, and his purchases are to a large extent directly dependent upon the volume and value of his poultry sales. (R. 260–261, 435.)

The Code was adopted to promote cooperative action, to regulate and promote interstate commerce and remove obstructions to its free flow by preventing unfair trade practices—selling poultry unfit for human consumption and uninspected poultry, secret rebating, selective killing, and pressure for reduced wages and increased hours. Many of these had existed for some time and had become more general during the last two years. (R. 446.) Selective killing, in particular, was a practice which had been increasing year by year. (*Ibid.*) The industry was the victim of "cut-throat" competition. (R. 1115–1116.) One of petitioners' witnesses testified that members of the industry "are looked upon as the worst type of business men in the world." (R. 1184.)

While the volume of live poultry receipts in New York City has been steadily downward since 1927, with a slight rise from 1929 to 1930, receipts in that city of dressed poultry have been uniformly upward since 1927, except for a drop from 1931 to 1932, and more dressed poultry was received in 1933 than at any previous time. (Ex. 24, R. 1583; R. 440–441.) It is, of course, impossible to state definitely to what extent uneconomic or improper practices in the live poultry industry contributed to this counter movement in volume of live and

dressed poultry shipments and consumption, but the evidence shows (R. 287–288, 366, 440–441) that sale of unfit poultry had caused trade to swing from live to dressed poultry.[9]

In 1927 the live poultry sold in New York had a value of $57,000,000; in 1933 its value was only $27,000,000, a decline of 53%. (R. 438–439.) The price per pound of fowls in New York fell from a 1929 average of 31.2¢ to a 1933 average of 14.4¢, and in the case of chickens from 30.3¢ to 13.8¢, a drop in each case of about 54%. (Ex. 23, R. 1581.) About 20% of the slaughterhouse operators have gone through bankruptcy or reorganization during the last four or five years. (R. 372.)

B. VIOLATION OF THE CODE PROVISIONS HERE IN ISSUE SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

The movement of live poultry from the farm in the West and South to sale over the counter to the householder in New York City and the functions performed by those handling the poultry in the course of this movement have been described. It has been shown that the New York market, by reason of its size, dominates other markets and fixes the price on which innumerable transactions all over the country are based.[10] As a witness for peti-

[9] Kosher-killed poultry is sold with the feathers on and it is very hard for a person who does not know poultry to distinguish an ordinary bird from a poor one after it has been killed. (R. 276.)

[10] The fact that the agency which reports New York egg and poultry prices derives its income from selling its reports

tioners said, the huckster who goes out to buy live poultry from farmers knows his operating and shipping costs and his profit margin and gauges the price offered farmers by the New York market price. (R. 1250.) The prices thus affected are in large part the prices in interstate sales.

With this factual background, it is necessary to examine the testimony of witnesses familiar with the industry [11] that the practices of petitioners materially affect the flow and character of interstate commerce and the interstate price structure.

POULTRY UNFIT FOR HUMAN CONSUMPTION [12]

Poultry diseases are contagious and a whole carload of live poultry may become infected from one or two birds. (R. 270, 724.) Poultry diseases are

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to telegraph companies, exchanges, dealers, and press associations, and publishing them in daily and weekly publications, is some indication of the extent of their dissemination. (Benjamin, *Marketing Poultry Products* (1923); pp. 255, 256.) The agency referred to is the same one at present reporting live poultry prices in New York. (R. 1075.)

[11] Four Government witnesses testified as to the practices in the industry: Dr. Ives, senior marketing specialist of the Bureau of Agricultural Economics of the Department of Agriculture and Supervisor of the Live Poultry Inspection Service in New York (R. 182–183); Mr. Tottis, a commission man (R. 248); Mr. Termohlen, principal agricultural economist in charge of the Poultry Unit of the General Crop Section of the Agricultural Adjustment Administration (R. 387); and Mr. Peterson, Code Supervisor of the Code and previously an economist in the Agricultural Adjustment Administration (R. 485).

[12] Count 2, R. 62–65. Poultry unfit for consumption will be referred to as unfit poultry.

communicable to humans, one witness knowing of 37 instances in which tuberculosis had been contracted from tubercular chickens. (R. 724.) Prior to the Code about 2% of the live poultry sold in New York was unfit for human consumption. (R. 283.) It is estimated that, if this 2% unfit poultry could be excluded from the market, the consumption of live poultry would increase about 20%. (R. 288.)

Unfit poultry is sold substantially below the market price. (R. 284, 414.) Petitioners, for example, sold such poultry at 6 to 10¢ per pound when the regular market price was 14¢. (R. 859–861, 926.) When a retailer purchases a batch of unfit poultry and pastes in his window notices advertising poultry substantially below the current price, his competitors immediately demand poultry which can compete with this price, and this creates a demand for unfit and inferior poultry and attracts "rejects" from western packing stations. (R. 284, 414–415, 422–425.) This wholesalers' demand for unfit poultry is also satisfied by shipments of unfit poultry from other cities. (R. 284–287.) Before the Code, New York was looked upon as the dumping ground for inferior and sick poultry. (R. 275, 284–287.) As expressed by witness Tottis, "Anything with a head on it" was shipped to New York. (R. 274–275.)

Unfit poultry sold in competition with high-priced poultry brings down the price structure for all grades of poultry, its effect being disproportionate to its relative quantity. (R. 291–292, 414–415, 421–422.) There is a tendency to narrow the range

between the price of good poultry and inferior poultry, which "means that the good poultry price comes down." (R. 276, 284, 291.) The consequent demoralization of the New York market price of all live poultry correspondingly reduces the returns to interstate shippers, and reduces the nationwide price of poultry. (R. 290, 291, 300, 422, 434.)

When shippers and farmers are able to dispose of unfit poultry in New York, it is sent there and the better grades of poultry are sent to dressing plants (R. 426); if the demand could be shut off by effectively prohibiting sale of unfit poultry in New York, these shipments would stop (R. 287, 368). The sale of unfit poultry has increased interstate shipments of unfit and inferior poultry (R. 284–287, 300, 422, 425, 481), and has decreased interstate shipments of healthy poultry (R. 300, 426).

Most of the live poultry brought into New York is kosher-killed and is sold with the feathers on. (R. 276.) It is very difficult for the consumer to distinguish unfit poultry after it has been slaughtered. (R. 288.) Many consumers, it was stated, have been "stuck" with unfit and inferior poultry and have shifted their patronage to dressed poultry, where they can see what they are buying. (R. 287–288, 366, 440–441; Ex. 24, R. 1583.) In the past four or five years there has been a decline of about 25,000,000 pounds in the amount of live poultry that is sold in New York, and a corresponding increase in the amount of dressed poultry sold there. (R. 287; Ex. 24, R. 1583.)

Since the adoption of the Code, there has been an appreciable improvement in the quality of the poultry shipped to New York. (R. 286, 293.) Witness Tottis testified that the packers, who had been unloading their inferior poultry on the New York market prior to the Code, had apparently "reformed." (R. 286.)

SALE OF UNINSPECTED POULTRY [18]

The Code prohibits the sale of live poultry which has not been inspected in accordance with the rules and regulations of the local area. (R. 39.) The regulations under the Sanitary Code of New York City, which is part of the city ordinances, prohibit bringing live poultry into New York City or offering it for sale there until inspected by the Inspection Service of the United States Department of Agriculture. (Ex. 18, R. 1579–1580.)

Since 1926 the Live Poultry Inspection Service of the Department of Agriculture has been inspecting live poultry brought into New York City. (R. 182–183.) Inspection is made only on request, application for inspection being made by the commission man or slaughterhouse operator who brings in the poultry. (R. 187, 204–205.)

Failure to inspect facilitates and induces the shipment to New York of unfit poultry and of inferior poultry, and encourages fraudulent practices in transit designed to increase weight, such as feeding chickens sand or gravel or constipating them.

[18] Counts 4 and 5, R. 66–69.

(R. 273–274, 292, 303, 430.) To the extent that failure to inspect permits sale of unfit poultry, it contributes to the burdens upon interstate commerce which this practice imposes. Those who study the market rely upon the figures as to volume of receipts furnished by the inspection reports. (R. 431–432.) If inspection is avoided, an inaccurate picture of the supply situation is obtained and this tends to distort market values. (*Ibid.*)

Since the Code, inspection has been more rigid, because buyers from commission men have insisted upon stricter inspection and the condemnation by inspectors of unfit poultry. (R. 202–203, 232–233, 264–265, 277.) In June 1933, the inspectors condemned, in round numbers, 9,000 pounds of live poultry and in June 1934, 23,000 pounds. (R. 239.) The figures for July 1933 and July 1934 are, respectively, 8,479 and 21,165 pounds. (*Ibid.*) The more rigid inspection has cut down considerably the volume of unfit poultry shipped to the New York market from other cities. (R. 293.)

STRAIGHT KILLING [14]

The Code prohibits sales by "wholesale" slaughterhouses on any basis other than the run of the coop (except unfit poultry) or on the basis of official grade. (*Supra*, p. 13.)

Prior to the Code the retailers who arrived first at a slaughterhouse selected from each coop the best poultry or the birds of most desirable weight, paying only the prevailing price. (R. 294, 295, 434.)

[14] Counts 24–33, R. 71–82.

The picked-over and rejected poultry had to be sold later at sacrifice prices and this poultry, when resold by the retailer at a cheap price, forced the market down and tended to break the general price structure. (R. 295, 434.) When prices go down, there is a tendency to ship poorer poultry to the market until the situation corrects itself. (R. 435.) Another evil effect of selective killing is the injury to the rejected chickens likely to occur when they are individually handled and then thrown back in the coop. (R. 434.)

Enforcement of straight killing would bring about grading according to weight or quality, or both, before shipment. (R. 295–296, 375–377, 433.) A direct outlet in New York for graded poultry would mean a truer relation between the price the shipper receives for his product and its value, and would encourage the farmers to raise a better quality of poultry and a larger volume. (R. 433–434.) Grading of birds by size would materially facilitate marketing in New York. (R. 375–376.)

The Code provision requiring "straight killing" has improved the quality of the poultry shipped to New York, and has had the effect of eliminating a large volume of unfit poultry from interstate channels. (R. 203.)

REPORTS [18]

The Code requires every member of the industry to submit to the Code Supervisor a weekly report

[18] Counts 38 and 39, R. 90–94.

showing "the range of daily prices and the volume of sales for each kind, grade, or quality" of poultry sold during the week. (*Supra*, p. 14.) This provision is essential to proper administration and enforcement of the Code.

In the case of commission men, the Code Supervisor, by comparing the volume of reported sales against the reports of the Inspection Service, can detect whether the Code provision against sale of uninspected poultry has been violated. In the case of slaughterhouses, the sales reports enable the Supervisor to determine which slaughterhouses fall within the Code definition of "wholesale" slaughterhouses (average weekly sales of 3,000 pounds or more) so as to be subject to the requirement of straight killing. The reports also furnish data necessary for the enforcement of Section 9 of Article V of the Code (R. 24), which provides that slaughterhouses shall employ a certain minimum number of employees depending upon the volume of their sales.

The Code requires a report of the "range" of daily prices for each kind of poultry sold, in other words, maximum and minimum prices. In view of the low price at which unfit poultry is sold (*supra*, p. 41), this disclosure would greatly facilitate detection of sales of unfit poultry.[16] For like reasons, the reports would aid in uncovering violations of the straight killing provision of the Code.

[16] Exhibit 38 (R. 1607) shows the high and low daily prices at which petitioner A. L. A. Schechter Poultry Corporation sold fowl and broilers during the period May 16,

Expenses of Code administration are financed by assessments on members of the industry based upon volume of sales. (R. 33–34, 1040–1041.) Reports are necessary for the administration of this Code requirement.

MINIMUM WAGES AND MAXIMUM HOURS [17]

The Code fixes 50¢ per hour as the minimum wage which must be paid to all employees and establishes, with exceptions immaterial here, 48 hours per week as the maximum hours of labor for any slaughterhouse employee. (*Supra*, p. 13.)

Slaughterhouse men sell at a small margin above operating costs. (R. 298.) Labor costs represent 50% to 60% of their operating costs. (R. 296, 329.) Slaughterhouses cut their prices when they reduce their costs of operation. (R. 298, 1156–1157.)

Witness Tottis, a commission man and wholesale marketman, testified that *it is the practice* of the poultry dealers in New York to reduce their prices to correspond with the amount paid out in wages, and that when operation costs have been reduced,

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1934 to June 9, 1934. The low prices on fowl varied on consecutive sales days in this remarkable way (in cents per pound): 15, 8, 8, 15, 8, 15, 8, 8, 19, 19, 17, 17, 17, 8, 8, 14, 16, 14, 4, 16, 10, 14, 14. It is fair to say that these prices, if reported, would have "stuck out like a sore thumb."

The word "average" under the word "price" in Exhibit 29, R. 1592, was written in by the reporting corporation. Compare Exhibit 30, R. 1597. The two exhibits as printed in the record do not show that the form of report prepared by the Code Supervisor is ruled off and two lines are allowed for each classification of poultry.

[17] Counts 46 and 55, R. 101–102, 111–112.

it is their practice to reduce their selling prices. (R. 298.) Whenever they make a saving on wages, it is reflected in a corresponding reduction in prices. (R. 298, 1156–1157.) Because of the cutthroat character of the competition in this industry (R. 1115–1116) the effect is almost automatic. When one marketman cuts prices as the result of a saving in wages, his competitors demand a cheaper grade of poultry in order to compete with him. (R. 297, 299, 358.) Because of the consumer's difficulty in distinguishing different grades of live poultry, the marketman "sells strictly on a price basis" whenever the stress of cutthroat competition requires him to meet the abnormally low price of the wage cutter. (R. 358, 434–435, 295.)

The resulting increased demand for middle grades and cheap grades of poultry lessens the demand for the finer grades and depresses the price of the better poultry. (R. 299.) Shippers then send more of their cheap, inferior poultry to the New York Market. (R. 299–300.) When a slaughterhouse operator cuts his wages and prices, others, to compete with him, likewise cut prices and this brings about a general demoralization of the price structure which reaches all the way back to the interstate shipper. (R. 299–300, 358, 422.)

When slaughterhouse employees work more than 48 hours in a week, a saving in extra help and reduction in operating costs result. (R. 299.) The practice of requiring employees to work more than 48 hours a week produces the same effects as cutting wages below the Code level. (R. 298–299.)

SALE TO AN UNLICENSED POULTRY DEALER[18]

The Code prohibits the sale of live poultry to a person who is required by law to have a license or permit to conduct the business of handling live poultry and who does not have such a license or permit. (*Supra*, p. 14.) The Sanitary Code of New York City prohibits keeping, selling or killing live poultry without a permit issued by the Board of Health. (Ex. 17, R. 1579.)

This Code provision, like that requiring the filing of reports, is incidental to the main purposes of the Code. Sale of poultry to unlicensed slaughterhouses or retailers makes proper supervision of the industry difficult. It encourages the entry into the industry of irresponsible persons who are likely to sell unfit poultry and uninspected poultry and to engage in destructive price cutting and other unfair methods of competition prohibited by the Code.

C. THE COURT BELOW ERRED IN VIEWING PRACTICES RELATING TO WAGES AND HOURS AS DIFFERING IN THEIR EFFECT UPON INTERSTATE COMMERCE FROM THE OTHER PRACTICES REGULATED BY THE CODE

The concurring opinion of Judge Hand does not make clear the precise ground for reversal of the conviction on counts 46 and 55. In view of the verdict and judgment on these counts the reversal represents either (1) a generalization that, as a matter of law, wage and hour practices in this in-

[18] Count 60, R. 117–119.

dustry cannot affect interstate commerce as do other aspects of the business which are regulated or (2) a holding that in the case at bar there was no evidence to support the finding of the jury that these employment practices do in fact affect interstate commerce in the industry as do the other practices for which a conviction was entered and affirmed. It is submitted that the former ground is untenable and that the latter ignores the evidence upon which the jury's verdict was based.

Judge Hand takes the view that the limits of Federal power to regulate, outside the field of interstate commerce itself, depend upon the extent of the effect of the practice regulated upon interstate commerce and that the question is one of degree. But it is submitted that his view that wage and hour regulation falls on one side of the line and the other practices regulated by the Code fall on the other represents either an *a priori* conclusion or one which the evidence and the verdict of the jury refute. His concurring opinion appears to ignore the test of degree which it sets up, because it proceeds to identify wages and hours with other matters, such as rent and the cost of knives used in slaughtering, having obviously far less importance and effect. The casualness with which reference is made to the fact that labor is "little more than half the cost" is surprising in view of its importance on the question of degree.

Competition in low wage payments and in other onerous terms of employment, such as long working hours, has been widely recognized as substan-

tially affecting the movement of goods and the course of trade. Such recognition has come from the Federal Government, from the States, and from foreign countries. Congress, in authorizing the President, through the flexible tariff, to equalize conditions of comparative cost in order that our industries might be protected against the inflow of goods from abroad, provided that wages paid to labor should be one of the factors taken into account.[19] Efforts to enact State legislation establishing high labor standards have been impeded or blocked by the belief that unless similar action is taken generally, commerce will be diverted from the States adopting such standards and toward those without them.[20] This fear of diversion of trade has led to demands for Federal legislation on the subject of wages and hours.[21] Only recently representatives of seven northeastern States signed an interstate compact to establish uniform standards for conditions of employment, and particularly a uniform minimum wage for women and minors.[22] Foreign countries

[19] Act of September 21, 1922, c. 356, 42 Stat. 942; U. S. C., title 19, sec. 156. Act of June 17, 1930, c. 497, 46 Stat. 703; U. S. C. Sup. VII, title 19, sec. 1336 (h) (4).

[20] See a study of the history of labor legislation for women in Massachusetts, U. S. Department of Labor; Women's Bureau: Bulletin No. 66–1, pp. 26–29, 31, 36.

[21] *Id.*, pp. 27–28, 33. See also Hearings before the House Committee on Labor on S. 158 and H. R. 4557 (thirty-hour week bill), 73d Cong., 1st Sess., pp. 8–9, 26, 739, 885.

[22] Delegates from Conn., Me., Mass., N. H., N. Y., Pa., and R. I. on May 29, 1934, signed such an interstate compact,

have attempted to meet in a similar way the problem of trade movements resulting from competing labor standards. Before the War a number of the European countries entered into an agreement to stabilize labor conditions in order to protect national trade from the effects of competition in lax labor standards. See Corwin, *The Doctrine of Judicial Review*, p. 161.

Those who sponsored the Recovery Act likewise fully recognized the importance of wage-cutting and degradation of labor standards as competitive practices affecting interstate commerce. We set forth in the Appendix, pp. 62–67, extracts from the President's message to Congress, the debates in Congress and the hearings on the bill which show that minimum wages and maximum hours of work were regulated by the Act because of the view that practices in respect of them were one of the most important factors in interstate competition, requiring control if fair competition in such commerce was to be attained.

If we turn from general considerations to the facts of this case, we find that violations of the wage and hour provisions of the Code set in motion the same kinds of currents or waves of disturbance as those set in motion by violations of the trade practice provisions. The situation may be briefly stated as follows:

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which requires submission to the respective state legislatures for ratification. Bureau of Labor Statistics; Monthly Labor Review, July 1934, pp. 61–65.

The industry is closely knit geographically. Its members congregate daily to purchase poultry at the railroad terminals or at West Washington Market. On a given day substantially all the wholesale slaughterhouse operators purchase at the same price, the day's quotation, for the same grade or quality of poultry.[23] The services performed by the slaughterhouses—hauling the poultry to their places of business, storing it over night or occasionally longer, slaughtering the poultry as an incident to sale—are simple and permit little opportunity for competition in efficiency and skill. Accordingly, they, and the retail butchers and poultry dealers who are their customers, compete primarily on a price basis and the industry is extremely sensitive to price competition.

A slaughterhouse operator, paying lower wages than his competitors or reducing his labor costs by exacting long hours of work, translates his saving in labor costs into lower prices. (*Supra,* pp. 47–48.) Unfit poultry is likewise sold below the market price. (*Supra,* p. 41.) Selective killing is a

[23] In *Wholesale Marketing of Live Poultry in New York City*, note 1, p. 30, *supra*, at page 31, the following statement is made concerning the method of determining price on the New York market:

"Under this arrangement it does not matter so much to the dealers in the New York City trade whether prices are out of line with what fundamental economic factors seem to warrant. The chief concern of the dealers is to make sure that all shall operate on the same basis and that none shall have an advantage so far as the basic price is concerned."

form of price concession, since the birds first selected are sold at the market price and the left-over birds are later sold at a lower price.[24] (*Supra*, pp. 44–45.) Offerings of poultry below the market price, for any of these reasons, force others to meet this competition by demanding poultry which they can sell at a like price, and this demand stimulates shipment to New York of cheap, inferior, and unfit poultry. (*Supra*, pp. 41–45, 48.) At the same time there is a decreased demand for the better and higher-priced grades of poultry and a less amount is shipped to the New York market. (*Supra;* pp. 42, 48.) There is, in consequence, a general lowering of the price level, and the returns to interstate shippers and farmers throughout the country are reduced. In the long run, such practices injure the industry and those engaged in it because consumers of its products become dissatisfied and distrustful and turn to dressed poultry. (*Supra*, p. 42.)

The volume of protest directed against petitioners' violations of the Code indicates how sensitive the industry is to the competitive practices of even one or two concerns. The Code was strictly adhered to by the entire industry during the first week it was put into operation.[25] (R. 495, 567.)

[24] This summary statement of the effect of these Code provisions upon interstate commerce is not intended to be exclusive. See the effect of enforcing straight killing in bringing about the interstate shipment of graded poultry. (*Supra*, p. 45.)

[25] Although the Code became legally effective April 23, 1934, it was not regarded as put into operation until May 16.

Beginning with the second week of operation, the Code Supervisor received innumerable complaints of petitioners' violations, every competitor in the Brooklyn district filing a complaint. (R. 568, 572–573.) The Schechters were the first to violate the Code (R. 533–534), and within one week their business jumped from 32,000 pounds to 48,000 pounds per week (R. 579). A great many people said that they would not be able to live up to the Code unless petitioners and others of like calibre did so. (R. 567.)

Respondent submits that the record lends no factual support to Judge Hand's assumption that it logically follows from a decision upholding the wage and hour provisions of the Code that Congress may control the rents of the slaughterhouses and the price paid for the knives used in slaughtering poultry. Labor costs are from 50% to 60% of operating costs. When the other 40% or 50% is divided among rent, light and heat, supplies and materials, taxes and other miscellaneous expenses, it is obvious that none of these items is of more than minor importance and that, in relation to their effect upon competition and interstate commerce, they fall into an entirely different category than regulation of minimum wages and maximum hours of labor. Moreover, Judge Hand's hypothesis is inapplicable, for here the practices are those of the slaughterhouse operators themselves

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1934, after the Code Supervisor had organized his staff and after a meeting in New York, attended by some 800 persons, to explain and discuss its provisions. (R. 492–494.)

in relation to others, including employees, engaged in the same business. The slaughterhouse operators exercise a much larger measure of control over wages and hours than over their rental payments or the prices they pay for knives.

It should also be noted that it is not inconceivable that Congress may "control" in a similar manner the cost of supplies purchased, where the practices determining that cost have a substantial effect upon interstate commerce. Precisely this result has been reached under the Clayton Act. In *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th), certiorari denied 282 U. S. 899, a packing company was permitted to recover triple damages under Sections 2 and 4 of the Act because the defendant manufacturer sold cans to a packing company, a competitor of the plaintiff, at discriminatory prices. The court upheld this application of the statute although over 99% of the sales to the favored concern were intrastate (see p. 770), upon the ground that the price discrimination in the intrastate sales of cans affected interstate commerce in the goods manufactured therefrom. If Congress can control the price which a manufacturer pays for his supplies where this is an element in competition affecting interstate commerce, it can under like circumstances bring within the measure of its control certain terms of his contracts for the employment of labor.

The question presented by this case is no different in kind from that which is presented on every occasion when the application of Federal power is

challenged. The extent and the limits of such power must be marked out by a process which in this field, as in others, is one of "judicial inclusion and exclusion." Cf. *Federal Trade Commission* v. *Keppel and Brother*, 291 U. S. 304, 312, and *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 397. The decision cannot be affected by suggestions that if the present power is sustained, it will extend to subjects which have only a fanciful relation to interstate commerce. No such suggestion drawn from hypothetical cases has heretofore prevented the process of judicial inclusion and exclusion from resting upon the facts established by the record.

D. UNDER THE DECISIONS OF THIS COURT, THE CODE PROVISIONS WHICH PETITIONERS VIOLATED ARE WITHIN THE COMMERCE POWER OF CONGRESS

1. THE APPLICATION TO THIS CASE OF *LOCAL 167* V. *UNITED STATES*, 291 U. S. 293

The Code provisions regulating practices of wholesale slaughterhouse operators, including those dealing with minimum wages and maximum hours of work, bear very much the same relation to interstate commerce as the practices in restraint of trade which were before this Court in *Local 167* v. *United States*, 291 U. S. 293, *supra*. That suit was a proceeding in equity under the Sherman Act brought against various wholesale slaughterhouse operators (called marketmen in the Court's opinion), an association of marketmen, and two labor unions and certain of their members who were alleged to be allied with the marketmen. The principal purposes of the combination were to allocate retailers among the wholesale marketmen and to increase

and maintain the prices charged by marketmen. Neither shippers nor commission men (receivers) were parties to the conspiracy. The means used in effectuating the conspiracy, as described by this Court (p. 295), were the assessment and collection of a large sum of money to pay for enforcement activities; hiring men to obstruct the business of dealers who resisted; spying on wholesalers and retailers; using violence and other forms of intimidation to prevent the free purchase of poultry; and, in the case of the labor unions, "for like purposes, and to extort money for themselves and their associates", refusing to handle poultry for recalcitrant marketmen and refusing to slaughter it.

Prior to the commencement of the equity action, most of the equity defendants had been convicted in a criminal proceeding under the Sherman Act charging the same conspiracy. The Circuit Court of Appeals affirmed.[28] In answer to the contention that there was no restraint of commerce between shippers and receivers, that interstate commerce ended with delivery of the poultry to the receivers and that the commerce restrained was therefore local, the court said (pp. 158–159):

> In the case at bar, the receivers did not warehouse the poultry or commingle it with local goods before disposing of it. They were merely a conduit through which flowed the daily stream of commerce from shippers to marketmen. It was clearly contemplated

[28] *Greater New York Live Poultry Chamber of Commerce* v. *United States*, 47 F. (2d) 156, certiorari denied, 283 U. S. 837.

> by the shippers that the poultry should pass through the receivers to the marketmen, for the shippers paid the charges for unloading, cooping, and cartage to West Washington Market, and the price paid the shippers depended on market price made by resale to the marketmen. • • • We believe the situation is analogous to that involved in the livestock cases already discussed, and we hold that the poultry remained in interstate commerce until sale by receivers to marketmen.

In the equity appeal the Government urged the same view, but this Court sustained upon a broader ground the decree of the District Court enjoining the conspiracy. It said (p. 297):

> It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. *Public Utilities Comm'n* v. *Landon*, 249 U. S. 236, 245. *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 309. *East Ohio Gas Co.* v. *Tax Comm'n*, 283 U. S. 465, 470–471. But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. *United States* v. *Brims*, 272 U. S. 549. *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 310.

> *United States* v. *Swift & Co.*, 122 Fed. 529, 532–533. Cf. *Swift & Co.* v. *United States*, 196 U. S. 375, 398. The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions. *Bedford Co.* v. *Stone Cutters Assn.*, 274 U. S. 37, 46. *Loewe* v. *Lawlor*, 208 U. S. 274, 301. The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operates substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry while unquestionably it is in interstate commerce.

The district court had enjoined interferences with loading, unloading, trucking, slaughtering, and buying in purely intrastate transactions, and it was argued on appeal that the decree was too broad in this respect. This Court, however, refused to modify the decree, saying (pp. 299–300):

> And, maintaining that interstate commerce ended with the sales by receivers to marketmen, appellants insist that the injunction should only prevent acts that restrain commerce up to that point. But intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce against any restraint denounced by the Act. *Bedford Co.* v. *Stone Cutters Assn., ubi supra. Gompers* v. *Bucks Stone & Range Co.*, 221 U. S. 418, 438.

This Court held, in effect, that it would take judicial notice that disturbance of the free marketing of poultry, as between wholesale slaughterhouses and retailers and as between the wholesalers and receivers, necessarily restrained and disturbed the antecedent flow of poultry in interstate commerce to receivers. There was no evidence, as there is here, that maladjustments and restraints in the business practices of the wholesalers materially affected and disturbed that flow. Moreover, there was no evidence that the conspirators intended to control the supply of poultry shipped to receivers or the price at which they sold to the slaughterhouse men, although in Sherman Act cases involving tortious interference with production, intent to control the supply of the product entering and moving in interstate commerce, or its price in interstate markets, is usually necessary to bring such interference within the scope of the Act. *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 310; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 408, 409.

The decision means, therefore, that, under the facts of this particular industry, the practices of the wholesale slaughterhouses are so closely related to the preceding interstate movement, that, from the standpoint of Federal regulatory control whether under the Sherman Act or otherwise, it makes no difference what parts of their business are "in" interstate commerce and

what parts, if not "in" interstate commerce, are nevertheless necessary to its proper functioning. The following factors may have been given consideration: The wholesale slaughterhouses furnish the connecting link between the interstate shipper and interstate consignee (receiver), on the one hand, and the retail stores in which the poultry comes to rest within the State, on the other hand. The coops of live birds move rapidly and continuously through the hands of both receivers and wholesalers, without change in form other than slaughtering incident to sale to retailers. The poultry must debouch smoothly through the wholesalers if the incoming interstate movement is not to become clogged. The wholesalers participate in certain unquestioned interstate activity, such as hauling poultry from the New Jersey terminals and trucking poultry from other States to their places of business.

The holding in *Local 167* that the commerce power, as applied in the Sherman Act, extends to intrastate conduct which obstructs or restrains interstate commerce, establishes no new doctrine. The significance of the case in the present connection is the determination that the combination of wholesale slaughterhouse operators, which restricted competition in dealings assumed to be intrastate, would sufficiently affect and burden the stream of poultry flowing into the New York market to be within Federal control and regulation. And, so far as the Federal power is concerned, there can be no difference between disturbances to

interstate commerce caused by a combination to eliminate competition and disturbances caused by excesses of competition or even by the forces of ordinary competition.

2. OTHER DECISIONS OF THIS COURT SHOW THAT THE FEDERAL COMMERCE POWER MAY BE APPLIED, AS IT HAS BEEN APPLIED IN THE CODE PROVISIONS WHICH ARE HERE IN ISSUE, TO PREVENT LOCAL ACTS WHICH THREATEN TO DISTURB OR DISLOCATE THE NORMAL FLOW OF INTERSTATE COMMERCE OR THE PRICE IN INTERSTATE MARKETS

While respondent emphasizes the fact that in *Local 167* v. *United States* this Court held, even without direct substantiating evidence, that practices which disorganized the orderly marketing of poultry by wholesale slaughterhouses burdened the flow of poultry in interstate commerce to the New York market; and while respondent contends that the practices which the Code prohibits, by causing changes in the character of poultry moving to New York and by influencing its price in interstate transactions, impose burdens on interstate commerce no less direct and substantial than the combination of slaughterhouse men and unions under consideration in *Local 167;* respondent wishes equally to emphasize that in its opinion that case represents merely an application to the facts of this particular industry of principles which are thoroughly established and which this Court has applied under a wide variety of facts and circumstances.

The history of Congressional legislation under the commerce clause and the decisions of this Court have confirmed the power of Congress to intervene

in order to protect commerce among the States from acts or conditions which Congress deems injurious to that commerce. The fact that those acts or conditions, considered by themselves, are located within a single State, does not serve to remove them from the ambit of Federal control. On occasion, that control has been exercised by prohibiting the movement of goods produced under conditions which affect interstate commerce adversely. Such was the exercise of Federal power in the commodities clause of the Hepburn Amendment, which prohibited shipment by a carrier of goods manufactured or produced by that carrier. See *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366.

More frequently the power has been exercised to remove or remedy acts or conditions which burden or obstruct interstate commerce. Physical obstructions caused by strikes growing out of a labor controversy can be prevented under the Sherman Act. *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295. Conditions of ownership detrimental to interstate commerce, consisting in the acquisition by one corporation of the stock of another where the effect of the acquisition "may be to substantially lessen competition between the two", are prohibited under the Clayton Act. *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554. Compare *Northern Securities Co.* v. *United States*, 193 U. S. 197. Unfair competitive practices, such as misrepresentation of the character of the business of the seller (*Federal*

Trade Commission v. *Royal Milling Co.*, 288 U. S. 212) or misleading description of a product (*Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67), are prohibited by the Federal Trade Commission Act."

This Court has sustained the power of Congress to regulate the business of and activities on exchanges, because they affect a national market and the price and movement of commodities in interstate commerce. Among these decisions, *Board of Trade* v. *Olsen*, 262 U. S. 1, sustaining the validity of the Grain Futures Act, is noteworthy.

Inasmuch as the case at bar also involves practices occurring in a central market which largely

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[27] Under Section 5 of the Federal Trade Commission Act prohibiting "unfair methods of competition in [interstate] commerce", the question whether the method as well as the competition must be in interstate commerce does not seem to have been discussed, but this Court said in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 647:

"In a case arising under the Trade Commission Act, the fundamental questions are, whether the methods complained of are 'unfair', and whether, as in cases under the Sherman Act, they tend to the substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein.'"

Whatever the correct conclusion as a matter of statutory construction, the constitutional power of Congress to prohibit intrastate practices which promote unfair interstate competition is no longer open to question. For instances in which intrastate acts have been condemned under Section 5, see *Federal Trade Commission* v. *Eastman Kodak Company*, 7 F. (2d) 994 (C. C. A. 2nd, affirmed on another issue, 274 U. S. 619); *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. (2d) 673 (C. C. A. 8th).

determine the national price of a commodity moving in interstate commerce, the *Olsen* case is peculiarly apposite. A comparison between that case and this one will demonstrate that the practices regulated in each have substantially the same effect upon interstate commerce. That case involved the Grain Futures Act, which regulated contracts for sales of grain for future delivery, most of which, this Court said (p. 36), "do not result in actual delivery, but are settled by offsetting them with other contracts of the same kind." The sales were between buyers and sellers in the city of Chicago; but it was contended that these sales of futures affected the price at which cash grain was sold throughout the country. Thus the question was not one of regulating the movement of a commodity in interstate commerce, or of directly regulating the price of a commodity moving in interstate commerce, but of regulating purely local activity which Congress had found (see pp. 4–5) affected the price of commodities moving in interstate commerce and caused price fluctuations which burdened and obstructed interstate commerce. This Court held the regulation valid, declaring (p. 40):

> The question of price dominates trade between the States. *Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it.* (Italics supplied.)

In the *Olsen* case interstate consignments of grain were affected by the prices of cash grain and,

more indirectly, by the prices of grain future contracts on the exchange in Chicago, which were affected by certain trading practices on the grain exchange. The primary purpose of the statute was to regulate the final link in the causal chain. Interstate commerce in poultry is affected by the price of the poultry moving in interstate commerce which is in turn substantially affected by the price in the New York slaughterhouses, which is in part determined by the competitive practices of the slaughterhouse operators. In each case there is a controlling market which affects the flow of commerce and the price. Petitioners' attempted distinction on the ground that one of the purposes of the Grain Futures Act was the prevention of monopoly is supported by neither the facts of that case nor the opinion of Chief Justice Taft.

United States v. *Patten,* 226 U. S. 525, upon which the Court relied by analogy in the *Olsen* case, further illustrates the power of Congress to bar activities in a central market which affect the price and movement of a commodity elsewhere. The case sustained an indictment under the Sherman Act which charged a conspiracy to purchase on the New York Cotton Exchange contracts for the future delivery of cotton in excess of the amount available for delivery at the due dates. This Court held (see pp. 542–543) that since a corner enabled the conspirators "to obtain control of the available supply and to enhance the price to

all buyers in every market of the country", it was altogether plain that the conspiracy, by its necessary operation, "would directly and materially impede and burden the due course of trade and commerce among the States."

Congress may enact legislation making it unlawful for meat packers to agree not to compete with each other in the purchase of cattle at the stockyards. *Swift & Co. v. United States,* 196 U. S. 375. The principles of this decision were held to support the constitutionality of the Packers and Stockyards Act regulating the practices of commission men and dealers in the major stockyards of the country. *Stafford* v. *Wallace,* 258 U. S. 495. See also *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420. In the former case the Court said (p. 515):

> Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate.

It also said (p. 521):

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it.

It may properly be said that in all these cases upholding the power of Congress to regulate, or to prevent abuses incident to the conduct of, national markets, dislocation of the normal flow of commerce and of price in interstate transactions was the essence of the burden on interstate commerce which warranted Federal control. These are the very types of dislocation which the Code provisions in issue are designed to eliminate.

Under the Sherman Act, the effect of price upon interstate trade has been clearly recognized. That Act has been deemed to prohibit the fixing of prices by agreement where the effect is unreasonably to restrain interstate commerce. *American Column & Lumber Co.* v. *United States*, 257 U. S. 377; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392.

Again, Congress may regulate local practices which affect interstate commerce because of their injurious or deceptive nature. The statute sustained in *United States* v. *Ferger*, 250 U. S. 199, made it a crime to forge a bill of lading representing an interstate transaction. The burden on commerce was the unwillingness to purchase valid bills which might be engendered by the circulation of fictitious bills: if bills of lading are not readily marketable, the flow of commerce is likely to be impeded. In like manner, the sale of unfit, inferior, or uninspected poultry destroys consumer confidence in the quality and fitness of the product and adversely affects the consumption of live poul-

try in the New York market and its shipment to that market."[28] Violation of the straight-killing and wage and hour provisions of the Code stimulates the sale and shipment of unfit and inferior poultry and thus contributes to the same result. (*Supra*, pp. 45, 48.)

Federal legislation providing for quarantining and disinfecting cattle in a State, to prevent spread of disease to other States, may be constitutionally applied to cattle ranging across the boundary line of two States because "the authority of Congress over interstate commerce extends to dealing with and preventing burdens to that commerce and the spread of disease from one state to another by such cattle ranging would clearly be such a burden, if it were not to be regarded as commerce itself." *Thornton* v. *United States*, 271 U. S. 414, 425.

Petitioners urge that, while the power of Congress extends to local activities which, as stated in *Board of Trade* v. *Olsen*, 262 U. S. 1, 39, "disturb the normal flow of actual consignments", the disturbance must be direct and substantial, and that the various decisions which have been cited turn on the particular facts and circumstances presented. They urge that, at least as to competition among slaughterhouse operators in the

[28] In the present case there is also shown (*supra*, pp. 41–43) the more immediate effect upon interstate commerce of a change in the character of poultry shipped to New York, because of the outlet for inferior and unfit poultry provided by such sales.

matter of minimum wages and maximum hours of work of employees, the effect of these practices on interstate commerce is too slight and incidental to be within Federal control." While *Local 167* v. *United States*, 291 U. S. 293, *supra*, seems directly in point, respondent's contention as to the other decisions is that the Code provisions which are at issue fall within the principles laid down and the considerations given weight, rather than that they are controlling on their facts.

This Court has approved regulation under the commerce clause where the effect upon interstate commerce is relatively slight as compared with the continuous effect exerted by the practices of slaughterhouse operators in their daily business transactions, for these operators are themselves essential adjuncts to the orderly flow of poultry to the New York market and are engaged in interstate commerce.

In *Colorado* v. *United States*, 271 U. S. 153, the Court sustained an order of the Interstate Commerce Commission authorizing an interstate railroad to abandon operation of an unprofitable branch line lying wholly within a State. The operating deficit on the branch line over a period of approximately seven years was less than 2% of the carrier's net railway operating income for those

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[29] But the fact that a slaughterhouse operator may meet his competitor's wage cut with one of his own does not render Congress powerless to act. *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 312–313.

years.[30] Nevertheless, the order of the Commission was sustained on the ground that losses incurred in operating the branch line might prejudice the carrier's ability efficiently to serve interstate commerce. In *Florida* v. *United States*, 292 U. S. 1, the Court sustained an order of the Commission setting aside certain intrastate rates for logs, upon the ground that the rates were unremunerative and therefore discriminated against interstate commerce. Yet the new rates which the Commission established increased the carrier's revenue during a two-year period by less than 2% of its net railway operating income.[31]

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[30] Net railway operating income from January 1, 1916, to December 31, 1920, totaled $13,723,554 (*Abandonment of Branch Line by C. & S. Ry.*, 72 I. C. C. 315, 319), and for 1921 and 1922 it was $1,903,793 and $1,061,877, respectively (*id.*, 86 I. C. C. 393, 395), or a total of $16,689,124 for the seven years. The operating deficit on the branch line from January 1, 1916, to May 21, 1925, was $147,597 (*id.*, 86 I. C. C. 393, 394–395).

Taxes on the branch line during this period were $157,244, but the record did not show how much they would be reduced by abandonment. (*Ibid.*) If the full amount of taxes be included in computing loss from branch-line operation, the loss is less than 2% of total net railway operating income.

[31] The carrier's net railway operating income was $12,874,207 and $7,241,304 for 1929 and 1930, respectively, a total of $20,115,511. *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. R. Co.*, 186 I. C. C. 157, 166. During the period February 8, 1929, to January 31, 1931, the carrier's revenue from the rates prescribed by the Commission exceeded that which would have been collected under the lower rates which the Commission set aside by $290,283. (*Ibid.*, p. 167).

In the field of commercial regulation as well, Federal power has been upheld where the disturbance to the flow of commerce is comparatively minor, for example, a strike halting production at particular mines (*Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295), the giving of premiums in penny-candy packages (*Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304), the forging of a small number of bills of lading (*United States* v. *Ferger*, 250 U. S. 199). These cases stand in contrast to the direct and substantial effect on interstate commerce shown in the case at bar.

An objection to the validity of regulation of minimum wages and maximum hours which petitioners may urge is that this has hitherto been left to the States, except as to employees directly engaged in interstate commerce (*Wilson* v. *New*, 243 U. S. 332; *Texas & N. O. Ry. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548). But extension of Federal regulation into fields previously occupied exclusively by the States is a common occurrence. Control by the Federal Government of certain stock acquisitions, strikes, agreements in restraint of trade, and unfair methods of competition constitutes, to that extent, a supersedure of State authority. Congress may also bring within its control intrastate rates which affect interstate commerce (*Houston, E. & W. T. R. R. Co.* v. *United States*, 234 U. S. 342; *Railroad Commission* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563).

Transactions which Congress may regulate may also be within the police or taxing power of the State. "The rule which marks the point at which state taxation or regulation becomes permissible" does not necessarily prevent "interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States." *Swift & Co.* v. *United States,* 196 U. S. 375, 400, *supra.* Accordingly, cases which hold that a state tax upon or regulation of manufacture or production does not burden interstate commerce because manufacture and production are not interstate commerce, do not fix the permissible limits of the commerce power of Congress. See *Kidd* v. *Pearson,* 128 U. S. 1; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165.

Cases such as *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, and *United Leather Workers* v. *Herkert & Meisel Co.,* 265 U. S. 457, holding that the mere stoppage of production by a strike having a local purpose is not within the Sherman Act rest upon a construction of what constitutes a combination in restraint of interstate commerce within the meaning of that Act rather than upon the constitutional limits of the commerce power of Congress. They are further inapplicable because the restraints in question affected only that portion of the supply produced in a small number of mines or factories, whereas here the Code seeks to regu-

late practices affecting the interstate movement of a substantial portion of the national supply.

Intent is material when the question is the scope of a conspiracy, but the constitutional limits of the power of Congress are not contracted or extended by the absence or presence of intent on the part of individual defendants. To put the matter in another way, the determination by Congress as to the necessity for particular regulation "serves the same purpose as the intent" which may be required in cases under the Sherman Act when the overt acts in carrying out a conspiracy are confined to the field of intrastate conduct. *Stafford* v. *Wallace*, 258 U. S. 495, 520–521, *supra*. See *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 408.

Manufacture and production seem sometimes to be regarded as if insulated from commerce, as if whatever concerned them necessarily affected interstate commerce only remotely. We submit that there is no such "closed class or category" of activity which, by reason of its inherent character, lies beyond the reach of the commerce power. In *Nebbia* v. *New York*, 291 U. S. 502, this Court recently rejected similarly artificial tests for determining the application of the due process clause of the Constitution.

3. PETITIONERS ARE IMPORTERS OF POULTRY FROM OTHER STATES AND CONGRESS MAY REGULATE THEIR HANDLING AND SALE OF SUCH POULTRY

The commerce clause protects against State prohibition of the sale of goods in the original package

after importation from other States, even though the goods have come to rest in a warehouse or store within the State, the reason being that freedom of sale is part of interstate commerce and interference with such freedom, as long as the merchandise is unsold and in the original package, is an obstruction.[32] *Leisy* v. *Hardin,* 135 U. S. 100, 110, 111. See also *Heymann* v. *Southern Railway Co.,* 203 U. S. 270; *Rosenberger* v. *Pacific Express Co.,* 241 U. S. 48. *Baldwin* v. *Seelig, Inc.,* 55 S. Ct. 497, holds that the commerce clause guarantees to an importer of milk from another State freedom to sell it, not only in the original container, but after it had been bottled within the State; that the State has no power to impose even a conditional prohibition of such sales.

If the decision in *Greater New York Live Poultry Chamber of Commerce* v. *United States,* 47 F. (2d) 156, *supra,* is correct and the wholesalers' purchases at the railroad terminals and at West Washington Market are purchases in interstate commerce, their importation of poultry and first sale are protected against State interference (other than proper sanitary control or like measures).

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[32] The fact that a State may levy a non-discriminatory property tax against such goods or a non-discriminatory occupation tax against the dealer who handles them (*Sonneborn* v. *Cureton,* 262 U. S. 506), does not limit the force of the decisions that the importation and sale are within the protection of the commerce clause.

The regulatory power of the Federal Government would seem to extend to a field of activity wherein the commerce clause circumscribes state action. Accordingly, if the interstate journey does not end with delivery of poultry to receivers (commission men) at the railroad terminals, the incidents of importation and first sale, and all aspects of the importers' business related thereto, would seem to be within the regulatory power of Congress.

As to poultry bought by and delivered to the slaughterhouse operators at the New Jersey terminals and as to poultry which they buy in other States and truck to their slaughterhouses, just as petitioners brought poultry from Philadelphia (R. 996–999), they are clearly importers of the poultry. As to poultry loaded on their trucks at the New York Central Terminal, the flow of poultry from shippers to them is clearly unbroken and continuous. Unloading, inspection, weighing and sale of the poultry at the terminal are services incidentally performed to promote the regular and steady movement of live poultry from shippers to slaughterhouse operators. Over four-fifths of the freight poultry is thus sold and transferred at the terminals and, of the balance brought to West Washington Market, one-half is transferred directly from the receivers' trucks to those of the slaughterhouse operators. (*Supra*, p. 33.)

From the standpoint of Federal regulation of the activities of the slaughterhouse operators, it is probably immaterial whether the sale of the small remaining portion of freight poultry, which, before sale, is unloaded at the receivers' stands in West Washington Market, is or is not a sale in interstate commerce. But we submit that these stands (and even more so the transfers made at the New York Central terminal) are in every way analogous to stockyards through the medium of which buyers are found for livestock shipped to the stockyards from other States. This Court has held that a combination to restrain freedom in buying and selling cattle on such stockyards and the charges and practices of the dealers and commission men who negotiate purchases and sales are subject to control by Congress. *Swift & Co.* v. *United States,* 196 U. S. 375, 398–399; *Stafford* v. *Wallace,* 258 U. S. 495; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420.

In *Stafford* v. *Wallace,* this Court said (pp. 515–516):

> The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only

> incident to this current from the West to the East, and from one State to another. * * * The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity.

The intermediate delivery of the poultry to the receivers at the railroad terminals does not break the interstate character of the movement from shippers in other States to slaughterhouse operators. Cases such as *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, 309, and *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U. S. 550, show that where, as here, there is continuity in the movement of a perishable commodity from one State to its intended destination in another, interstate transportation is not arrested by an intervening change in custody and title.

The shadowy character of any distinction between the activities of the slaughterhouse operators which are "in" interstate commerce and those which are not is illustrated by the nature of the duties performed by the employee with respect to whom the wage and hour violations occurred. This employee was the bookkeeper of the A. L. A. Schechter Corporation. (R. 101–102, 111–112, 1013, 1016, 1018–1019; Ex. 37, R. 1606.) The bookkeeper, in recording the corporation's purchases of

poultry, was engaged in performing duties essential to the carrying on of its purchases of poultry in interstate commerce. Therefore, apart from the broader aspects of the relation to interstate commerce of the wage and hour regulation of the Code, the particular violations which are before the Court arose out of employment affecting interstate commerce. While other duties of the bookkeeper may have concerned wholly intrastate transactions, this is immaterial since his rate of pay and working hours must be regulated as a unit or not at all. Intrastate transactions can be regulated by the Federal Government where these transactions are so interwoven with interstate commerce that the latter cannot be effectively regulated without control of the former. *Minnesota Rate Cases,* 230 U. S. 352; *Houston E. & W. Texas R. R. Co.* v. *United States,* 234 U. S. 342.

4. THE MINIMUM WAGE AND MAXIMUM HOUR PROVISIONS OF THE CODE ARE NOT CONTROLLED BY THE DECISION IN *HAMMER* V. *DAGENHART,* 247 U. S. 251.

Hammer v. *Dagenhart,* 247 U. S. 251, held unconstitutional an act of Congress which prohibited interstate shipment of the product of any mine or factory in which children had been employed within thirty days of the removal of the product. The Court said (p. 276) that the necessary effect of the legislation was "to regulate the hours of labor of children in factories and mines within the States." Subsequently, this Court sustained a Federal statute prohibiting the interstate transporta-

tion of stolen motor vehicles and, in distinguishing *Hammer* v. *Dagenhart,* said that the child labor law was held invalid "because it was really not a regulation of interstate commerce but a congressional attempt to regulate labor in the State of origin, by an embargo on its external trade." *Brooks* v. *United States,* 267 U. S. 432, 438.

In the *Dagenhart* case no attempt was made to show that the employment of child labor had any substantial effect upon interstate commerce in the articles manufactured. It was contended that factories in States in which child labor was prohibited were placed on an unequal competitive basis with factories in other States, but there was no suggestion that the practice aimed at burdened, obstructed or diminished the flow of interstate commerce. The evidence in the present case that the Code practices which are regulated cause such a burden and obstruction is a sufficient ground of distinction between the child-labor case and the one at bar.

A second and more important ground of distinction is the different purpose and objective of Congress in the Recovery Act. The child-labor statute dealt with interstate commerce only when there had been a departure from certain labor standards in production preceding commerce. The legislation was cast in the form of commerce regulation to achieve a non-commerce purpose, to impose upon those engaged in production a prescribed labor policy.

In the Recovery Act, on the other hand, wage and hour regulation is authorized only as a part of, and in subordination to, the fixing of standards of fair competition and, as trades and industries are organized today, codes of fair competition are codes of fair interstate competition. The provisions of the Act, the Committee reports, the debates in Congress, the hearings on the bill and the circumstances existing at the time the statute was enacted, all establish that the first and foremost purpose of Congress in the Recovery Act was rehabilitation of trade and commerce, and that regulation of minimum wages and maximum hours of labor was authorized from the standpoint of eliminating unfair competitive practices in interstate commerce.

In section 1 of the Act Congress declared the existence of a national emergency "which burdens interstate and foreign commerce." In its declaration of policy, the policy first declared was, "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof."

Title I of the Act authorizes codes of fair competition and Title II provides for the construction of and loans in aid of public works and various construction projects, and authorizes an appropriation of $3,300,000,000 for the purposes of the Act. Congress authorized this vast appropriation in a time of diminished public revenue in order to set the wheels of industry and commerce in motion, to "prime the pump."

The House Ways and Means Committee in its report on the bill stated (H. Rep. No. 159, 73d Cong., 1st Sess., p. 11):

> The public-works program should produce immediate substantial revival of business. The industrial recovery program should * * * add to this stimulation * * *. By raising the standard of labor conditions throughout trade and industry, through voluntary cooperation with the aid of the Government, unfair competition, based upon the employment of underpaid and overworked labor, should be generally eliminated.

The Senate Finance Committee in its report on the bill discussed the Committee changes in the House bill and printed the report of the House Committee. (Sen. Rep. No. 114, 73d Cong., 1st Sess.)

We again refer to statements made by the President in his message to Congress and to statements made on the floor of Congress and in hearings on the bill which are set forth in the Appendix, pp. 62–67. They show that the proponents of this legislation deemed wage cutting and the lengthening of working hours as destructive of interstate commerce and fair interstate competition.

Regulation may be valid when Congress intended to act and did act under its commerce power although regulation of the same kind could not be supported under this power when Congress intended to act and did act under some other power.

Compare *Board of Trade* v. *Olsen*, 262 U. S. 1, *supra*, with *Hill* v. *Wallace*, 259 U. S. 44. It follows that a type of regulation which was invalid when, as in the child-labor law, Congress legislated for a non-commerce purpose, should be upheld when, as in the Recovery Act, Congress legislated upon the same subject for a commerce purpose. And even if the Court should conclude that Congress in this legislation may have been actuated, in part, by other purposes, this would not affect the validity of the statute. Legislation enacted for a purpose within constitutional power is valid although other ends not within such power were sought to be attained. *Stephenson* v. *Binford*, 287 U. S. 251, 276.

A further ground of distinction between the present case and *Hammer* v. *Dagenhart* is the wholly different situation of industry, trade, and commerce when the Recovery Act was passed. In a time of severe depression, interstate competition and commerce are peculiarly sensitive to and affected by variations in terms of employment. Interstate commerce is the instrumentality by which producers or localities impose their labor standards upon producers and localities elsewhere."

When the child-labor law was passed (1916), the World War was in progress and every effort was

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" See *Some Legal Aspects of the National Industrial Recovery Act*, 47 Harvard Law Review 85, 88–89; Wahrenbrock, *Federal Anti-Trust Law and the National Industrial Recovery Act*, 31 Mich. Law Rev. 1009, 1054–1055.

directed toward increasing production. The primary competition was between employers to secure adequate labor. In 1933 the economic situation was reversed. Competition in the ranks of labor to sell their services afforded opportunity to hard-pressed employers to exploit their workmen, and when the less scrupulous yielded to this temptation, others were forced by competition to pursue the same course. Whether or not interstate commerce was substantially affected by child labor in 1916, it will scarcely be contended that interstate commerce was not vitally affected by wage-cutting in the depression years.

It is submitted that what practices and conditions materially affect interstate commerce, so as to be within Federal control, is a question of fact. Trade practices and labor conditions, which in normal times would have only an indirect and incidental effect upon interstate commerce, may substantially burden interstate commerce during a period of overproduction, cutthroat competition, unemployment, and reduced purchasing power. See *Richmond Hosiery Mills* v. *Camp*, 7 Fed. Supp. 139, 144; *Southport Petroleum Co.* v. *Ickes*, 61 Wash. L. Rep. 577. The issue presented for determination here should not be prejudiced by the fact that nearly twenty years earlier, when economic conditions were altogether different, a bare majority of this Court concluded that a statute with wholly different objectives was not within the Federal commerce power.

E. PRACTICES RESPONSIBLE IN PART FOR A WIDESPREAD AND SHARP DECLINE IN PRICES AND WAGES CONTRIBUTE TO THE OBSTRUCTION OF INTERSTATE COMMERCE AND MAY BE REGULATED BY THE FEDERAL GOVERNMENT.

We have maintained thus far that the provisions of the Live Poultry Code here in question are valid regulations of interstate commerce because the practices regulated are part of or substantially affect interstate commerce in that industry. There is, however, an independent ground on which these provisions can be sustained. The Code was not an isolated effort at Federal regulation. It was part of a broader plan embodied in the National Industrial Recovery Act and applicable to numerous industries in or affecting interstate commerce.

The Recovery Act was passed after production, trade and commerce had been declining for three and one-half years and after the decline had assumed tremendous proportions. The purpose of the Act and of the codes of fair competition authorized by Title I was the promotion of recovery in commerce and industry. The justification under the commerce clause for particular provisions in the codes may be based in part upon their relation to the revival of business and commerce. In this view they are to be regarded as reasonable means of remedying the breakdown in trade and commerce then existing, a breakdown so severe and extensive that it was "the outstanding contemporary

fact, dominating thought and action throughout the country." *Atchison, T. & S. F. Railway Co. v. United States,* 284 U. S. 248, 260.

The sharp downward trend of business was marked by a catastrophic fall in commodity prices, a heavy decline in wages, salaries, and employment and a curtailed market for both consumers' and producers' goods. These factors interacted upon and intensified each other, producing a cumulative downward trend. In this period of falling prices and shrinking business, overhead charges—such as interest, taxes, depreciation and depletion of plant—remained fairly constant and so became a relatively heavy burden. The practice of sharply reducing prices in an effort to obtain a larger share of the decreased demand required a reduction in costs. The pressure to reduce costs is generally directed toward the item most easily subject to control, namely, labor costs. Reduction of wages and other forms of reduced labor costs are relatively easy in a time of depression because of the demoralization in the labor market caused by widespread unemployment. As prices and wages are cut by individual employers or groups of employers, others in self-preservation are compelled to do the same. The process tends to repeat itself at constantly lower and lower levels."

" The processes of the "vicious spiral of deflation" are thus succinctly described by Alexander Sachs, the first Chief of the Division of Economic Research and Planning of the

The effect upon business and commerce of these various forces, by the spring of 1933, is not a matter of surmise; it is incontrovertibly established. The

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National Recovery Administration in *National Recovery Administration Policies and the Problem of Economic Planning*, printed in *America's Recovery Program* (Oxford University Press, 1934), pp. 107, 120–121:

"Such then was the transformation of the readjustment processes of the depression into a 'vicious spiral' of deflation, or more accurately, into a series of reenforcing and widening vicious ellipses with two foci rather than a center, depending upon the settings—the vicious ellipses of lower purchasing power and lower volume, lower volume and lower prices, lower values and lower credit worthiness, while each and all required for solution reversal of the trend of liquidation and contraction. Such was the culmination in an economic and financial *reductio ad absurdum* of the liquidity complex and the cut-throat competition to the points of: (a) making bank deposits illiquid, (b) wiping out the net profits above operating expenses and charges of a representative composite of American corporations, (c) eliminating farm income as a result of a drop of two-thirds in agricultural prices, so that not only farm debt but local tax charges for schools and other communal needs could not be met, (d) of a reduction from 1929 levels of over half to two-thirds in basic industrial employment and pay rolls respectively, and in hourly rates of about one-third—as compared with a fifth for German labor and only one-twentieth for British labor—and (e) of depressing below subsistence requirements the wages of unskilled labor in a number of industries where cut-throat competition under the credit and depression crises became particularly rife to the destruction of decent labor and trade conditions. It was this deficit condition on current account in an economy dependent predominantly upon the internal exchange of goods and services on a mass production and a mass consumption basis, that the National Recovery Act and Administration were called upon to remedy."

following Government indices illustrate the severity of the decline:

	1929 Average [1]	February 1933 [2]	Percent of decline
Industrial production	119	65	45
Commodity prices	95.3	59.5	37
Factory employment	101.1	59.4	41
Factory pay rolls	107.7	40	63

[1] Survey of Current Business, Ann. Suppl., 1932, pp. 9, 25, 55, 65.
[2] *Id.*, April 1933, pp. 22, 24, 27, 29. The index numbers for production and employment are adjusted for seasonal variation.

Estimated national income fell from $81,136,000,000 in 1929 to $48,894,000,000 in 1932 (a 40% drop) and total wages received in mining, manufacturing, construction, and transportation from $17,179,000,000 in 1929 to $6,840,000,000 in 1932 (a 60% drop).[55] Estimates of the number unemployed in March 1933 vary from over 13,650,000 to over 17,150,000.[56]

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[55] Sen. Doc. No. 124, 73d Cong., 2d Sess., *Report on National Income, 1929 to 1932*, p. 14.

[56] The number of unemployed in March 1933 has been estimated by the American Federation of Labor at 13,689,000, by the Cleveland Trust Company at 13,833,000, and by the Alexander Hamilton Institute at 17,169,000. (Proceedings of 53d Ann. Convention of Am. Fed. of Labor, p. 312; Clev. Trust Co. Business Bulletins, Jan. 15, 1934; Business Conditions Weekly, Mar. 10, 1934.) The estimates of the American Federation of Labor show an increase in unemployment from January 1930 to March 1933 of over 10,000,000; the estimates of the Cleveland Trust Company show an increase in unemployment during this same period of over 10,800,000; the estimates of the Alexander Hamilton Institute show a rise in unemployment of over 13,000,000 from 1929 to March 1933.

The effect of these factors upon the interstate movement of goods was necessarily severe. A reasonably accurate index of such interstate movements is found in the statistics of railway freight traffic. The aggregate of whole carloads of freight declined from 52,827,925 in 1929 to 28,200,000 in 1932, a decline of 46%.[37] Revenue freight originating in Class I roads declined from 1,339,091,000 tons in 1929 to 646,223,000 tons in 1932, a decline of 51%.[38]

These facts underlay the declaration of Congress in the Recovery Act that there existed "a national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce."

Proposals for remedying the crisis in 1933 were many and varied. But there was substantial agreement on certain basic facts, namely, that the paralysis of commerce was national in extent and that national measures were required to overcome it. There was moreover widespread belief that among the most effective measures to this end would be the elimination of the wastes and excesses of competition which the depression had intensified and the establishment of a level below which wage cutting should not proceed. The view was

[37] Information Bulletin No. 639 of Car Service Division of American Railway Association.

[38] Department of Commerce, Bureau of Foreign and Domestic Commerce, Statistical Abstract of the United States, 1933, p. 357.

widely held, moreover, that a prompt increase in total wage distributions would provide a necessary stimulus to start in motion the cumulative forces making for expanding commercial activity.[39] A reduction in hours of labor works, of course, in the same direction, since it distributes wage payments among a larger number of workers and to this extent tends to increase the proportion of such payments promptly spent.

The interrelation of the various phases of our commercial system, particularly marked in a time of severe stress, has been clearly recognized by this Court. *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 372:

> The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail,

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[39] See for example the statement of Senator Wagner, who assisted in drafting the Recovery Act and explained its provisions to the Senate (Cong. Rec., vol. 77, pt. 5, pp. 5153–5154):

"I want to emphasize the minimum-wage provisions. In my opinion the depression arose in large part from the failure to coördinate production and consumption. During the years 1922–29 corporate earnings rose very much faster than wage rates. * * * The great mass of consumers did not receive enough pay to take the goods off the market. * * * In retracing our steps to the land of plenty, we must set up sounder security than bubbles. The only safeguard is a well-planned wage program, dispersing adequate purchasing power throughout the economic system."

Wages and salaries of employees constitute between 60 and 65 percent of our national income. *National Income, 1929–1932*, Sen. Doc. No. 124, 73d Cong., 2d Sess., p. 14.

> when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.

The problem, in short, was not confined to production or distribution or consumption, but was concerned with the interrelation of all these aspects of the economic order. Nor was the problem confined to particular States.

Modern industry, dominated in an increasing degree by large scale enterprises serving multi-state and national markets and drawing on widespread sources of supply, is not confined by state lines. The modern development of so-called "central office" enterprises, with establishments in many States under a single control, is a recent mechanism by which single enterprises are enabled to cover expanding areas. But whatever the form which large scale industry takes, its territorial and economic concentration extends and intensifies the interstate character of its activities. These characteristics are well known; they are illustrated by the data set forth in part 10 of the Appendix. Industrial management or self-government is necessarily carried on with purposes and instruments nationwide or multi-state in scope. When a measure of public regulation is required, Government cannot afford to be any less realistic than business itself in adapting the scope of control to the scope of the commercial problem.

But the problem of public regulation in the interest of commerce was not confined in the crisis of 1933 to those industries in which concentration had progressed furthest. Thus, for example, a well-organized industry with well-organized labor support may maintain fair prices and fair wages but will steadily lose its market as low wages in other industries reduce general purchasing power. Progressive and excessive price and wage cutting tend to destroy commercial intercourse.[40]

Congress alone could deal effectively with the causes contributing to the breakdown of interstate commerce. The situation could not have been met by the voluntary action of separate trade groups, because such action to be successful had to be general, and because in almost every trade or industry a minority which would have taken advantage of the situation blocked the possibility of voluntary cooperative action by the majority.

Nor could the situation have been met by separate action of the States. It would have been impossible to obtain prompt and uniform action by the individual state legislatures. The intense competition among the States for the national or

[40] "We cannot achieve order unless we establish it everywhere. One exploiting employer can drag an entire trade down to his level; one disorganized trade can unsettle an industry; and one bankrupt industry can cause maladjustment throughout the nation." (Speech of Senator Wagner in behalf of the National Industrial Recovery Act, Cong. Rec., Vol. 77, Part 5, p. 5154.)

regional market in numerous industries had been perhaps the most powerful deterrent in the past to state legislation dealing with minimum wages, maximum hours and other elements in commercial competition. See p. 51, *supra*. Moreover, attempts to make such state legislation effective by applying it to goods from other States would have been invalid under the Commerce Clause of the Constitution. Cf. *Baldwin* v. *Seelig, Inc.*, 55 S. Ct. 497. The historic purpose of that clause was the prevention of barriers erected by one State against the products of another. But it was not intended that the Constitution should substitute for the barriers of the States the chaos of uncontrollable excesses of competition affecting commerce among the States.

The solution which the framers of the Constitution provided was the regulatory power of the Federal Government. That power was meant to be exercised over "the commerce which concerns more states than one." *Minnesota Rate Cases*, 230 U. S. 352, 398; *Gibbons* v. *Ogden*, 9 Wheat. 1, 194."

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[41] It will be remembered that the Constitutional Convention was called largely because the Articles of Confederation had not given the Federal Government power to regulate commerce. Soon after the Convention assembled it adopted by a vote of nine States in favor, none opposed, and one divided, the following resolution proposed by Governor Randolph of Virginia:

"* * * that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all

Congress was not impotent to deal with the conditions causing a paralysis of commerce, nor was it impotent to apply the remedies deemed by it necessary and appropriate to remedy those conditions. Instances of Federal regulation of local activities and practices which affect interstate commerce in a single trade or industry have been previously discussed. The power of Congress, it is submitted, is no less effective to deal with activities and practices which because of their widespread character and effect contribute substantially to the impairment of interstate commerce as a whole. If the power "to foster, protect, control and restrain" interstate commerce, *Texas & New*

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cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation" (Madison's Debates, H. R. Doc. No. 398, 69th Cong. 1st Sess., p. 117).

Shortly thereafter Paterson proposed his New Jersey plan, which included the provision that Congress could "pass Acts for the regulation of trade and commerce as well with foreign nations as with each other" (Madison's Debates, p. 205).

The New Jersey plan was, however, rejected and the Virginia plan reapproved. Subsequently the wording of Randolph's resolution was, by a vote of eight to two, clarified to read as follows:

"*Resolved*, that the national legislature ought—

"1. To possess the legislative rights vested in Congress by the confederation; and

"2. Moreover, to legislate in all cases for the general interests of the Union, and

"3. Also in those to which the States are separately incompetent, or

Orleans Railroad Co. v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, 570, includes the power to regulate the commissions of livestock brokers, *Tagg Bros. and Moorhead* v. *United States,* 280 U. S. 420, to forbid the forging of bills of lading, *United States* v. *Ferger,* 250 U. S. 199, and to prevent the giving of premiums in penny candy packages, *Federal Trade Commission* v. *Keppel and Bro.,* 291 U. S. 304, that power must include the control of practices, such as those involved in the case at bar, whose cumulative effect in

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"4. In which the harmony of the United States may be interrupted by the exercise of individual legislation" (Madison's Debates, pp. 389, 466).

This resolution was then sent to the Committee of Detail for drafting. The Committee changed the indefinite language of the resolution into an enumeration of the powers of Congress closely resembling Article I, Section 8, of the Constitution as finally adopted. The commerce clause, which was adopted unanimously *without further discussion*, read as it does now (Madison's Debates, p. 475). The absence of objection to or even comment upon the change is susceptible only of the explanation that the Convention believed the enumeration conformed to the standard previously approved. And since the commerce clause is the only one of the enumerated powers in which Congress was given any broad power to regulate trade or business the Convention must have understood that it was granting through the commerce clause wide powers over trade and business which would enable the national government to provide for situations which the States separately would be unable to meet.

For an account of the adoption and early application of the commerce clause, see Robert L. Stern, *That Commerce Which Concerns More States than One,* 47 Harv. L. Rev. 1335.

the crisis had demoralized the whole of interstate commerce.

The contention is not that Congress may control any form of activity which may conceivably to some degree affect interstate commerce, or that an economic crisis confers such power. The contention rests upon the facts. The depressed state of the national economy made it evident that interstate commerce was demoralized and endangered by acts which under other conditions might not seriously affect it. Because of this effect and this danger Congress could bring those acts within its regulatory power under the commerce clause. In *Wilson* v. *New*, 243 U. S. 332, 348, this Court, speaking of legislation based upon the commerce clause, said that "although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." This is but an application to an unusually exigent situation of the now familiar principle that the facts which call forth legislative measures may be determinative of the validity of an exercise of legislative power. *Stafford* v. *Wallace*, 258 U. S. 495, 513; *Nashville, C. & St. L. Ry.* v. *Walters*, 55 S. Ct. 486, 488.

F, THE WAGE AND HOUR PROVISIONS ARE APPROPRIATE MEASURES TO PROTECT INTERSTATE COMMERCE FROM THE BURDENS CAUSED BY LABOR DISPUTES

The wage and hour provisions, as has been shown, are in one aspect part of a code designed to eliminate unfair competitive practices. But these provisions have an additional basis. They are part of a plan established in the National Industrial Recovery Act for the prevention of restraints on commerce caused by labor disputes. Section 7 (a) of the Act contemplates provisions in the codes designed to secure the right of collective bargaining and the establishment of standards of minimum wages and maximum hours. The provision of the Act dealing with the right of collective bargaining is not here in issue and will not be discussed in detail. Together with the wage and hour provisions, however, it constitutes an appropriate means toward the assurance of greater industrial peace and the freedom of commerce consequent thereon.

The importance of standards of minimum wages and maximum hours in the field of industrial disputes cannot be questioned. By far the most frequent immediate cause of strikes has been a demand for increased wages or a resistance to decreased wages. This cause alone has been responsible for between 20% and 40% of all strikes. See U. S. Dept. of Labor, *Monthly Labor Review*, July 1934, p. 75; also Daugherty, *Labor Problems in American Industry* (1933), p. 362. Nor can the effect

of such labor difficulties upon interstate commerce be controverted. There is, of course, no method of measuring precisely the effect of strikes upon commerce among the several States. Responsible surveys, however, have indicated the extent of strikes in terms of the number of employees annually involved;[42] the average number of days lost per year;[43] and the cost of strikes to employers, em-

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[42] During the period from 1915 to 1921 there was an average of 3,043 strikes each year, involving an average of 1,745,000 employees a year. During that period an average of one out of every ten employees was involved in a strike every year. In the single year 1919 there was a total of 4,160,348 employees involved in strikes. In the period from 1922 to 1926 there was an average of 1,050 strikes each year, involving an average of 775,000 workers a year. This amounted to more than one out of every twenty-five employees involved in a strike each year. The period from 1927 to 1931 averaged 763 strikes a year, involving 275,000 employees, or about one out of every seventy-five employees, each year. These figures are taken from Daugherty, *Labor Problems in American Industry* (1933) pp. 356, 358, and are based upon studies by Paul H. Douglas, *An Analysis of Strike Statistics*, Journal of American Statistical Association (Sept. 1923) pp. 866–77; *Monthly Labor Review*, June 1932, pp. 1353–62; and W. I. King, *The National Income and Its Purchasing Power* (National Bureau of Economic Research, 1930) p. 56. For other statistics on strikes see U. S. Commissioner of Labor, *Twenty-first Annual Report:* Strikes and Lockouts (1906); *Strikes and Lockouts in the United States, 1916–1932*, *Monthly Labor Review*, June 1933, pp. 1295–1304; *Monthly Labor Review*, July 1934, pp. 68–82.

[43] The average number of days lost per year by reason of strikes and industrial disturbances during the period 1915 to 1921 amounted to 50,242,000. In the period from 1922 to 1926 the yearly average was 17,050,000. From 1927 to 1931 it was 5,665,000. *Supra*, note 42.

ployees and the public." Strikes in one industry compel shut-downs and lay-offs in other industries. Frequently they engender bitterness and unrest which is reflected in decreased efficiency and increased cost of production. The development of large-scale production and the growing complexity and interdependence of the economic order have vastly increased the number and disastrousness of strikes and lockouts. See Commons and Andrews, *Principles of Labor Legislation* (1920), p. 125. The effect of labor disputes upon commerce has been recognized in Federal legislation dealing with the railroads, and in the establishment during the war of the National War Labor Board. This Court has had frequent occasion to observe and recognize the effect of strikes and other labor disputes upon commerce among the several States. *In re Debs,* 158 U. S. 564; *Duplex Printing Press Co.* v. *Deering,*

" The National Association of Manufacturers has reported that the cost of strikes in the ten-year period from 1916 to 1925 reached the total of $12,982,048,000, of which $46,000,000 fell on employers, $1,804,000,000 on employees, and $10,682,000,000 on the general public. National Association of Manufacturers, Convention Proceedings, 1926, p. 136. J. H. Hammond and J. W. Jenks have estimated that the wage and industrial loss of the peak strike year, 1919, was about $2,000,000,000. Hammond and Jenks, *Great American Issues* (1921) p. 99. The estimate of another writer for the same period was $10,000,000,000. M. Olds, *The High Cost of Strikes* (1921) p. 210. Professor Daugherty has calculated that for the 1927 to 1931 period the average annual loss from strikes amounted to about $200,000,000. Daugherty, *Labor Problems in American Industry*, p. 360. See also *Monthly Labor Review*, September 1920, pp. 593–600.

254 U. S. 443; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; *Bedford Cut Stone Co.* v. *Stone Cutters Assn.*, 274 U. S. 37.

In *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board*, 261 U. S. 72, 79, this Court recognized the determination of Congress that it was "of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes." And in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 565, this Court agreed that the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" The conditions of economic stress prevailing in 1933 made the danger of labor unrest and disputes particularly serious, and afforded special reason for the adoption of preventive measures by the Federal Government. It was, of course, unnecessary that Congress wait until industrial unrest should have itself come to a crisis. The power to take preventive measures is as available as the power to provide remedies. See *Stafford* v. *Wallace*, 258 U. S. 495, 520; *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks, supra.*

Section 7(a) of the Recovery Act, contemplating and authorizing the establishment of standards of minimum wages and maximum hours, was a method of narrowing the area of labor contro-

versy. It was calculated to remove from that area the most fruitful single source of difficulty. It was, therefore, an appropriate means of protecting commerce among the States from undue burdens attendant upon the destruction and demoralization caused by industrial strife.

II

THE RECOVERY ACT AND THE PROVISIONS OF THE LIVE POULTRY CODE FULLY SATISFY THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

In *Nebbia* v. *New York*, 291 U. S. 502, this Court defined the scope of the Fifth Amendment as a limitation upon the power of the Federal Government, as follows (p. 525):

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

The Objectives of the Recovery Act and the Means Selected.—The Recovery Act was expressly designed to remove obstructions to interstate and foreign commerce brought on by a long-continued

depression of unparalleled severity. Confronted by a grave national crisis believed to have been occasioned in large part by the excesses of the competitive system, Congress adopted the view that its prior policy regarding competition afforded inadequate protection for interstate and foreign commerce, and declared a policy of more definitely restricted and regulated competition. This Court is, of course, concerned neither "with the wisdom of the policy adopted" nor with "the adequacy or practicability of the law enacted to forward it." *Nebbia* v. *New York, supra,* p. 537. The Court there stated (p. 537):

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.* "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *Northern Se-*

> *curities Co.* v. *United States*, 193 U. S. 197, 337–8. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.

The means selected in the Recovery Act for the achievement of its objectives was the formulation of codes of fair competition to be approved by the President upon the application of trade or industrial groups. Codes were to derive from the cooperative action of trades or industries. The Act seeks to make use of the judgment of those most vitally concerned and most familiar with the problems of a trade or industry, as a guide to the President in determining the provisions best calculated to effectuate the purposes of the Act with respect to such trade or industry. To insure that a code applied for represents the judgment of a trade or industry as a whole and to prevent unfair treatment to particular members thereof, no group is permitted to apply for a code unless it imposes no inequitable restrictions on admission to membership and unless it is truly representative of the trade or industry.

To safeguard against possible hardship to small enterprise, express provision is made to insure that

the codes will not be used to permit monopolies or monopolistic practices. Protection of the welfare of persons not engaged in a particular trade or industry but affected by a proposed code is insured by affording them an opportunity to be heard prior to approval of the code. Further protection of those both within and outside a trade or industry is secured by enabling the President to impose conditions on his approval of a code for the protection of consumers, competitors, employees, and others, and to provide exceptions to and exemptions from the provisions of a code.

Both the evils to be eliminated and the remedy to be applied took different forms in different industries. It would manifestly have been impossible for Congress itself to have legislated separately for each trade or industry. Any attempt at such legislation would have delayed other national measures which the public welfare insistently demanded. We submit that it was not arbitrary, unreasonable, or capricious for Congress to conclude, as it did in the Recovery Act, that the protection of interstate and foreign commerce required prompt and simultaneous action with respect to the hundreds of trades and industries whose activities had so injuriously affected the free flow of such commerce and to provide, as a means of remedying the evils, for the formulation of codes to originate from and to be based upon the cooperative action and judgment of the trades or industries concerned.

It is fundamental that the burden of proving a statute arbitrary or unreasonable rests upon the person challenging its constitutionality. *O'Gorman & Young, Inc.*, v. *Hartford Fire Ins. Co.*, 282 U. S. 251; *Metropolitan Casualty Insurance Co.* v. *Brownell*, 55 S. Ct. 538. So far as the Recovery Act itself is concerned, petitioners have made no attempt to satisfy this burden, and it is submitted, therefore, that the Recovery Act cannot, upon this record, be held violative of due process of law. Petioners' attack upon particular provisions of the Code consists in the main of the claim that such provisions bear no substantial relation to the regulation of interstate commerce. The evidence adduced by the Government and considered under Point I, *supra*, amply establishes the contrary.

The restrictions imposed by the Poultry Code, as is true of all codes, embody the judgment of a substantial portion of the industry as to what is both necessary and reasonable. In this respect the restrictions upon liberty of contract imposed by codes differ materially from those involved in any statute which has hitherto come before this Court. Self-imposed restrictions, submitted by a representative group in an industry, generally, as in the case of the Poultry Code, representing the great majority of those affected, are not likely to be arbitrary or capricious. The assent of the industry is significant, if not overwhelming, evidence that they are not.

We turn now to a consideration of (1) the particular Code provisions involved in this case, and (2) the procedure whereby the Poultry Code was approved, so far as relevant to the constitutional guarantee of due process of law.

A. THE PROVISIONS OF THE LIVE POULTRY CODE ARE REASONABLE REGULATIONS BEARING A REAL AND SUBSTANTIAL RELATION TO OBJECTIVES WITHIN THE SCOPE OF THE COMMERCE POWER

The relation of the code provisions to interstate commerce has been fully discussed previously. It was there shown that such regulations have a substantial tendency to remove diseased or inferior poultry from the channels of interstate commerce, to increase the flow in interstate commerce of healthy poultry of high quality, and to eliminate and discourage practices seriously affecting the price at which live poultry is sold in interstate transactions. The regulations have thus been shown to have a substantial relation to the attainment of ends plainly within the scope of the commerce clause. That, in addition, such regulations are not unreasonable and do not operate in a capricious or arbitrary manner, is apparent from the following:

Dealings in unfit or uninspected poultry and sales to unlicensed dealers.—The code makes it unlawful to deal *knowingly* in poultry unfit for human consumption. The sale of unfit poultry is also made unlawful under local law (R. 410-412). This requirement is patently not violative of due

process. (See *North America Storage Co.* v. *Chicago*, 211 U. S. 306.) It is equally clear that the requirement of inspection prior to the sale of poultry is a reasonable regulation. (Compare *Adams* v. *Milwaukee*, 228 U. S. 572; *Asbell* v. *Kansas*, 209 U. S. 251; *Thornton* v. *United States*, 271 U. S. 414; *Mintz* v. *Baldwin*, 289 U. S. 346.) As inspection is required only in accordance with local regulations and ordinances, this requirement places no burden upon petitioners to which they are not already subject. The prohibition of sales to unlicensed dealers is similar in character. It imposes no undue burden upon petitioners to require them not to sell to persons whose dealings in poultry are outlawed by local regulations. Unlicensed dealers evade the sanitary regulations of the local board of health. They are likely to sell unfit and uninspected poultry and to resort to wholesale violations of the code.

"*Straight killing.*"—This regulation merely imposes the duty upon slaughterhouse operators of requiring persons purchasing poultry for resale to accept the run of any half coop, coop or coops (excepting culls), *as purchased by the slaughterhouse operators*. It is obvious that this provision not only does not impose any burden on the slaughterhouse operator but simplifies his business because it enables him to sell coops or half coops as purchased by him. The practice prevailing prior to the code whereby purchasers from slaughterhouse operators were permitted to select particular chick-

ens led to price cutting and caused injury to the chickens through excessive handling. It also resulted in increased shipments of inferior poultry. The "straight killing" provision eliminates these evils. Moreover, it will eventually bring about careful grading according to size and quality before shipment, thus improving the quality of poultry moved in interstate commerce and, by enabling slaughterhouse operators to deal wholly on the basis of grades, facilitating their sales and improving their market. The burden imposed on the slaughterhouse operator by this regulation is, at the most, slight; on the other hand, its benefits to him and its relation to interstate commerce are real and substantial.

Reports.—The requirement of weekly reports showing the range of daily prices and volume of sales is a reasonable method of obtaining information essential to the proper administration and enforcement of the code. Such a reporting system facilitates the detection of violations of the code. The information required is not only readily available to the slaughterhouse operator but must be known to him in the successful operation of his business. The reports are simple to prepare. Similar requirements have been sustained in other statutes. *Baltimore & Ohio R. R.* v. *Interstate Commerce Commission,* 221 U. S. 612; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194; *Board of Trade* v. *Olsen,* 262 U. S.

1, 42; *Bartlett Frazier Co.* v. *Hyde*, 65 F. (2d) 350 (C. C. A. 7th), certiorari denied, 290 U. S. 654; *United States* v. *Katz*, 271 U. S. 254.

Minimum wage and maximum hours.—Petitioners made no attempt to attack the particular minimum wage and maximum hours schedules established by the code as being arbitrary or unreasonable or as operating unfairly or injuriously as to petitioners. The burden of such an attack was plainly upon petitioners and, in view of their failure to make any showing in support of such a contention, petitioners' claim must rest upon the assertion that the fixing of a minimum wage or of maximum hours of labor is *per se* violative of due process.

Legislation respecting wages and hours of labor, including the fixing of rates of compensation and maximum hours of work, has often been upheld against attack under the due process clause. Rates of compensation:[1] *Wilson* v. *New*, 243 U. S. 332;

[1] In a number of cases statutes regulating practices affecting wage payments have been upheld. Regulating the redemption of store orders issued for wages (*Knoxville Co.* v. *Harbison*, 183 U. S. 13; *Keokee Cons. Coke Co.* v. *Taylor*, 234 U. S. 224); regulating the assignment of wages (*Mutual Loan Co.* v. *Martell*, 222 U. S. 225); requiring payment for coal mined on a fixed basis other than that usually practiced *McLean* v. *Arkansas*, 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple*, 236 U. S. 338); fixing the time for payment of wages (*Patterson* v. *Bark Eudora*, 190 U. S. 169; *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348; *St. Louis I. M. & St. Paul Ry.* v. *Paul*, 173 U. S. 404; *Erie Railroad Co.* v. *Williams*, 233 U. S. 685); establishing a system of compulsory work-

Tagg Bros. & Moorhead v. *U. S.*, 280 U. S. 420; *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251. Hours of labor:[2] *Wilson* v. *New, supra; Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Bunting* v. *Oregon*, 243 U. S. 426; *Muller* v. *Oregon*, 208 U. S. 412; *Holden* v. *Hardy*, 169 U. S. 366. The fact that the purpose of the regulations in those cases was different from that of the Recovery Act can hardly be material. If such regulations are not unreasonable infringements of liberty when based upon considerations involving the health and morality of workers, they are no less reasonable when designed to eliminate unfair wage cutting, destructive of interstate commerce. Such regulations were sustained in the *Wilson*, *Tagg Bros. & Moorhead* and *Baltimore and Ohio Railroad* cases, *supra*, as appropriate regulations of interstate commerce.

The attack upon the minimum-wage provisions of the code rests chiefly upon the case of *Adkins* v.

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men's compensation (*New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219).

[2] In many other cases regulation of hours of labor of women has been upheld. *Riley* v. *Massachusetts*, 232 U. S. 671; *Hawley* v. *Walker*, 232 U. S. 718; *Miller* v. *Wilson*, 236 U. S. 373; *Bosley* v. *McLaughlin*, 236 U. S. 385; *Dominion Hotel* v. *Arizona*, 249 U. S. 265; *Radice* v. *New York*, 264 U. S. 292. Prohibition against child labor in certain industries was sustained in *Sturges & Burn Co.* v. *Beauchamp*, 231 U. S. 320.

Children's Hospital, 261 U. S. 525. To the extent that this case was based upon the view that the statute there involved, providing minimum wages for women in the District of Columbia, was "simply and exclusively a price-fixing law" (p. 554), and that neither prices nor wages could be established in a business not "affected with a public interest", it would seem clearly inconsistent with the decision of this Court in *Nebbia* v. *New York*, *supra*.

Moreover, the majority opinion in the *Adkins* case indicates at least three points of difference between that case and the regulations now under attack. (1) The Court was unable to find any reasonable relationship in the *Adkins* case between the fixing of minimum wages and the protection of the health and morals of women.[1] No such difficulty exists in the present case, for there is obviously a real and substantial relation between the establishment of a minimum wage and the elimination or mitigation of competitive wage cutting. (2) In the *Adkins* case the Court stressed the fact that the

[1] The Court said (p. 556): "The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages; and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis."

law took account only of the necessities of the employee. "The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business * * *. The necessities of the employee are alone considered * * *" (261 U. S. 525, 557–558). Where, as under the Recovery Act, the regulations result from the cooperative activity of industry, they can scarcely be said to ignore the necessities of the employer. And insofar as the minimum-wage and maximum-hour provisions can be said to involve concessions to labor, the Act gives to employers a reciprocal benefit by suspending *pro tanto* the operation of the antitrust laws. (3) The Court in the *Adkins* case explicitly recognized that under the doctrine of the so-called emergency cases (*Wilson* v. *New, supra, Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170) an emergency might make reasonable an interference with the liberty of contract which in ordinary times would be invalid. The Recovery Act is emergency legislation, designed to cope with a serious national depression the existence of which is a notorious fact, as this Court has judicially noticed in several recent cases.

Regulation of the hours of labor has been stricken down in but two cases: *Lochner* v. *New York*, 198 U. S. 45, and *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522 and 267 U. S. 552. Concern-

ing the first of these cases, Chief Justice Taft, dissenting in the *Adkins* case, *supra*, stated (p. 564):

> It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case*, and I have always supposed that the *Lochner Case* was thus overruled *sub silentio*.

And in the *Wolff Packing Company* cases, the decision of the Court was based on the fact that the regulation was merely a feature of the system of compulsory arbitration established by the statute, and as "part of the system", shared "the invalidity of the whole" (267 U. S. 552, 569).

The reasonableness of the minimum wage and maximum hours provisions of the Poultry Code must be judged not only by a consideration of the conditions obtaining in the poultry industry but also in the light of the objectives of the Recovery Act as a whole and the importance given to such provisions in the statutory scheme. The Recovery Act was designed to deal with a nation-wide paralysis of commerce manifested, primarily, by an unprecedented decline in purchasing power resulting from widespread unemployment and excessively low wages. Revival of purchasing power was recognized as the major objective of any program for the rehabilitation of interstate commerce. Minimum wage provisions, by raising the wages of the lowest earners, and maximum hours provisions, by decreasing unemployment, were the chief means selected in the Recovery Act to increase purchasing

power and thus rehabilitate commerce throughout the nation.

For still other reasons the existence of millions of unemployed and of countless others who, though employed, were receiving less than a living wage, was a matter of national, and not merely local, concern. While the revenues of the Federal Government were shrinking with the decline of commercial activity, the necessity of providing relief for the millions without means of sustenance was imposing an ever-increasing financial burden upon the Federal Government.[4] The undermining of the morale of so large a portion of the population threatened the very existence of government. To provide jobs for the unemployed, to raise the level of wages so as to provide a decent standard of living, and to restore to the millions of destitute confidence and hope in the future well-being of the nation, were, under the circumstances confronting Congress, proper objectives of the Federal Government.

Where the constitutional basis of a statute is established and the question is one of reasonable-

[4] As has been pointed out (*supra*, p. 89) the number of unemployed in March 1933 was estimated at from 13,000,000 to 17,000,000. In that month 4,560,000 families, representing 15% of the total number of families in the United States, were receiving emergency relief. (Monthly report of the Federal Relief Administration, Nov. 1934, p. 1.) This does not include single persons or transients receiving relief. In November 1934, 4,233,074 families and 770,601 single persons, or a total of 19,017,815 persons representing 15% of the total population, were receiving relief. (*Ibid.*)

ness under the due process clause, all of the advantages to be gained from the legislation become material. The Recovery Act is based upon the commerce power of Congress and is designed to attain ends within the scope of that power. That the Act is also calculated to accomplish other ends in the interest of the national welfare affords strong additional support in favor of its reasonableness.

B. THE PROVISIONS OF THE RECOVERY ACT AND THEIR APPLICATION IN THE LIVE POULTRY CODE TO PETITIONERS ARE CONSISTENT WITH THE PROCEDURAL REQUIREMENTS OF DUE PROCESS OF LAW

If a citizen is to be punished for violation of the legislative order of an executive officer due process of law requires that the order shall have been issued in accordance with the procedural requirements laid down in the statute. (See *Panama Refining Company* v. *Ryan*, 293 U. S. 388, 432.) In the instant case counsel for petitioners have conceded that the procedural requirements of the Recovery Act were complied with in the formulation of the Poultry Code (R. 404), and accordingly any claim in this respect cannot now be urged. However, for the information of the Court, there has been included earlier (pp. 8–12) a summary description of the procedure employed in promulgating the Live Poultry Code.

It was there shown that the approval of the code was preceded by (1) an application for a code made by groups found to be truly representative of the industry, (2) adequate notice of a hearing,

(3) a hearing at which all interested parties were given an opportunity to be heard, (4) submission to the President of a complete stenographic record of the hearings and of reports containing recommendations and findings of the Secretary of Agriculture and the Administrator for Industrial Recovery, and (5) findings by the President in accordance with the provisions of the Act. We submit that the steps thus taken fully satisfy all procedural requirements of due process of law.

Due process of law does not guarantee to a person a particular form or method of procedure. What is fair and reasonable varies according to the nature of the order to be issued, and the rights to be affected. The approval of codes of fair competition establishing general rules applicable to an entire industry would clearly appear to be quasi-legislative rather than quasi-judicial in character. Where the order is of such character, due process requires only that the procedure shall satisfy elementary standards of fairness and reasonableness. (See *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.)

It is not necessary here to attempt a precise definition of the procedural requirements of due process. The Government submits that the procedure leading to the approval of the Live Poultry Code was eminently fair and reasonable, judged by the strictest of standards.

III

THE AUTHORIZATION BY CONGRESS TO THE PRESIDENT TO APPROVE CODES OF FAIR COMPETITION IS A CONSTITUTIONAL DELEGATION OF POWER

The principles by which a delegation of authority by Congress to the President are to be tested have recently been reaffirmed by this Court in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. The Court there stated that it was necessary to "look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition" (p. 415).

In the *Panama* case the Court held that Section 9 (c) of the Recovery Act was unconstitutional, but did not pass upon the validity of the delegation contained in Section 3 (a). It was pointed out that Section 9 (c) contained no language which could be said to establish a policy or criterion to govern the President's action, and that none of the other provisions of the Recovery Act "can be deemed to prescribe any limitation of the grant of authority in Section 9 (c)" (p. 420). Finally, it was held that even if the statute could be said to impose conditions upon the President's power, the President made no findings to show that he had complied with the conditions established.

The Court indicated that it regarded Sections 3 (a) and 9 (c) as presenting entirely different

problems of delegation, both because Section 3 (a) contained a primary standard, "fair competition", and because it required findings by the President. The Court said (p. 419):

> Section 3 provides for the approval by the President of "codes" for trades or industries. These are to be codes of "fair competition", and the authority is based upon certain express conditions which require findings by the President.

A. THE RECOVERY ACT CONTAINS A SUFFICIENT STANDARD

Section 3 (a) authorizes the President to "approve a code or codes of fair competition" for a trade or industry or subdivision thereof—

> Upon the application to the President by one or more trade or industrial associations or groups * * * if the President finds
>
> (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and
>
> (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them,
>
> (3) and will tend to effectuate the policy of this title. (Numbers ours.)[1]

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[1] The President's discretion is further restricted by other provisions of the Act.

Section 3 (a) provides that "codes shall not permit monopolies or monopolistic practices" and "that where such

It is the Government's position that Section 3 (a) establishes "fair competition" as the primary standard to guide the President in approving codes. As the Court declared in the *Panama* case (p. 426), "Congress * * * may establish primary standards, devolving upon others the duty to carry out the declared legislative policy." Both the words "fair" and "competition" are important. They indicate that codes to be approved by the President are to be restricted to regulations of competition and practices affecting competition, and that the regulation is to be directed to the placing of competition upon a fair plane.[2]

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code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes."

All Codes are required to contain the conditions set forth in Section 7 (a) of the Act with respect to collective bargaining and compliance with wage and hour schedules.

Section 5 provides that neither the Act nor any regulations under it "shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor * * * prevent anyone from marketing or trading the produce of his farm."

[2] In the Hearings before the House Ways and Means Committee (H. R. 5664, 73d Cong., 1st Sess.) Senator Wagner stated (p. 96):

"The purpose of the present bill is not to abolish competition but to lift its standards and to raise its plane so as to eliminate destructive practices, unfair practices, competition in the reduction of wages, and the lengthening of hours. In other words, efficiency, rather than ability to sweat labor and undermine living standards, will be the determining factor in business success."

That Congress intended "fair competition" to be the standard for the President's action appears from Section 3 (b) of the Recovery Act, in which it is stated that "the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof", and that "Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act."

Fair competition is a familiar concept. Congress has employed it—or the antithetical expression "unfair methods of competition"—in the Federal Trade Commission Act (15 U. S. C. Sec. 45) and in the Tariff Act of 1922 (19 U. S. C. Sec. 174). It has been recognized by numerous important industries in the formulation of codes of fair competition in trade practice conferences held under the auspices of the Federal Trade Commission. (See: Federal Trade Commission, *Trade Practice Conferences* (1933).)

This court has recognized that the phrase "unfair methods of competition" was designedly one which "does not admit of precise definition, but the meaning and application of which must be arrived at by * * * the gradual process of * * * inclusion and exclusion." *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, 312; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 648. Under the Federal Trade Com-

mission Act the determination of what practices constituted unfair methods of competition was left ultimately to the courts. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Federal Trade Commission* v. *Keppel & Bro., supra.* Under the Tariff Act of 1922, the ultimate determination as to what methods of competition were unfair was left to the President, who was to be guided though not bound by the recommendations of the Tariff Commission. *Frischer & Co.* v. *Elting*, 60 F. (2d) 711, certiorari denied, 287 U. S. 649. Under the Recovery Act, the determination of what provisions are proper for codes of fair competition is again left to the President; and his discretion in approving codes under Section 3 (a) is limited to codes submitted to him by representative groups in the various industries.

The codes will therefore consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems. What practices are regarded as fair or unfair will, of course, vary with the industry. But in each industry the concept of fair competition will have a practical and known meaning, and the members of the industry will be persons well fitted to decide what that meaning is. There is authority for such a resort to business experience and practice in making rules applicable to particular industries. See *St. Louis & Iron Mountain Ry. Co.* v.

Taylor, 210 U. S. 281, 286–7 (American Railway Association authorized to designate standard height of draw bars); *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126–7 and *Erhardt* v. *Boaro*, 113 U. S. 527 (rules as to mining claims).[3]

It is not, of course, material that the rules of fair competition submitted by industry and approved by the President may be broader in scope than the "unfair methods of competition" condemned by this Court under the Federal Trade Commission Act. The purpose of Congress in the Recovery Act clearly included the prohibition of practices regarded by industry as unfair because of their tendency to destroy the price structure without economic justification.[4] Moreover, the codes were

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[3] These cases indicate that a delegation to an industrial as contrasted with a Governmental body is not invalid, even when the action of the industry becomes effective without being approved by a government official. This Court has recently recognized that the power to recommend a plan which is to become effective only upon approval by a public official does not constitute a delegation of authority to a non-governmental agency. *Doty* v. *Love*, 55 S. Ct. 558. The reasoning of that case would seem no less applicable to a code submitted by industry but given force and effect only upon approval by the President than to a plan of reorganization submitted by creditors but to be approved by the Chancellor. A Code so proposed is an inchoate instrument without legal force until it receives Presidential approval.

[4] Section 4 (b) begins "Whenever the President shall find that destructive wage or price cutting or other activities contrary to the policy of this title * * *." This clearly indicates that destructive price and wage cutting practices were to be prohibited under the Act.

clearly intended to prohibit the practice now considered the most harmful and unfair of all methods of competition—the exploitation of employees through the cutting of wages and lengthening of hours of labor. See Sections 1, 4 (b), and 7 and pp. 136–137, *infra*. In determining whether a delegation of authority to the Executive is a valid one, the question is not whether the primary standard has the same meaning as in a prior statute, but whether there is an adequate policy or standard prescribed for the Executive.

The standard in the Recovery Act would seem more definite than that in the Federal Trade Commission Act. The Federal Trade Commission Act forbids "unfair methods of competition." The Recovery Act authorizes codes of "fair competition." The Trade Commission Act contains no indication at all as to what the phrase "unfair methods of competition" is to mean. In the Recovery Act, on the other hand, Congress has set forth criteria by which the phrase "fair competition" is to be construed, and has required the President to find that the codes conform to these criteria.

The primary standard of "fair competition" in the Recovery Act is given further meaning and substance by the requirement in Section 3 (a) that the President must find that codes of fair competition "will tend to effectuate the policy of this title." The words "policy of this title" clearly refer to the "policy" which Congress declared in the

section entitled "Declaration of Policy"—Section 1.[a] All of the policies there set forth point toward a single goal—the rehabilitation of industry and the industrial recovery which unquestionably was the major policy of Congress in adopting the National Industrial Recovery Act. All fit into a single pattern for the accomplishment of this broad purpose by the elimination of practices believed to be inimical to that purpose. It may be argued that Section 1 may not in itself contain a standard or policy sufficient to guide the discretion of the President. But the requirement that the President find that codes of fair competition will tend to effectuate the policy there laid down both (1) sets a limit upon

[a] The declaration of policy in Section 1 reads as follows:

"It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

The holding in the *Panama* case that this declaration could not be read by implication into Section 9 (c) as a qualification of the unlimited power conferred by that section does not indicate that the declaration has no application to Section 3 (a), into which it is specifically incorporated by reference.

his power to approve codes and (2) gives additional substance and meaning to the phrase "fair competition" by serving as a guidepost to what the codes of fair competition contemplated by the Act were to include.

This Court has frequently upheld legislation in which other language as general as "fair" or "unfair" competition was used, and in which the broad term was given content by the remainder of the statute and the nature of the subject regulated.

A striking example is *New York Central Securities Corp.* v. *United States*, 287 U. S. 12. That case involved Section 5 (2) of the Interstate Commerce Act (41 Stat. 481), which authorized the Interstate Commerce Commission to approve acquisitions of stock by railroads in other railroads "whenever the Commission is of opinion * * * that the acquisition * * * will be in the public interest." The term "public interest" by itself establishes no definite standard and is considerably more vague than "fair competition." It is to be noted that Section 5 (2) refers to no other portion of the Interstate Commerce Act as defining the phrase or giving it substance and meaning, and no other section of the Act does so. Moreover, no section of the Interstate Commerce Act purports to establish any general policy which would apply to Section 5 (2). It thus appears that while the phrase "fair competition" in the Recovery Act is limited and given meaning by other provisions of the statute, the expression "public

interest" in the Interstate Commerce Act is neither limited nor defined by such criteria. And yet the delegation in the latter Act was upheld, upon the ground that "public interest" was given content by the provisions and manifest purposes of the Transportation Act of 1920 viewed as a whole. The Court declared (pp. 24-25):

> Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the "public interest." It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. * * * The provisions now before us were among the additions made by Transportation Act, 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and

to the issue of certificates of public convenience and necessity.

Other cases in which the use of general expressions as a standard has been upheld are *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (public convenience, interest or necessity); *Avent* v. *United States*, 266 U. S. 127, and *United States* v. *Chemical Foundation*, 272 U. S. 1 (in the public interest); *Colorado* v. *United States*, 271 U. S. 153, 168, and *Chesapeake and Ohio Railway* v. *United States*, 283 U. S. 35, 42 (certificates of public convenience and necessity); *Tagg Bros. and Moorhead* v. *United States*, 280 U. S. 420 (just and reasonable commissions); *Wayman* v. *Southard*, 10 Wheat. 1 (in their discretion deem expedient); *Buttfield* v. *Stranahan*, 192 U. S. 470 (purity, quality, and fitness for consumption); *Union Bridge Co.* v. *United States*, 204 U. S. 364 (unreasonable obstruction to navigation); *Mahler* v. *Eby*, 264 U. S. 32 (undesirable resident).

The fact that the grant of power to the President in Section 3 (a) is expressed in permissive language through the use of the word "may" rather than the imperative "shall" does not render the delegation invalid. In many cases statutes containing grants of authority expressed in permissive language have been upheld, although in all of them the objection could have been made that the statute did not *compel* the administrative agency to act even after making findings or determining what was neces-

sary to comply with the standard established. See *United States* v. *Grimaud*, 220 U. S. 506; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Intermountain Rate Cases*, 234 U. S. 476; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416; *Avent* v. *United States*, 266 U. S. 127; *United States* v. *Chemical Foundation*, 272 U. S. 1; *Sproles* v. *Binford*, 286 U. S., 374; *New York Central Securities Corporation* v. *United States*, 287 U. S. 12. It is sufficient that a standard is established to guide the Executive in the exercise of his discretion whether the delegation be expressed in permissive or mandatory terms.[a] In the case at bar the President is clearly to be guided by the policies and standards found in the Act in determining whether to approve codes; and he cannot

[a] This court has held in a number of cases that "may" should be regarded as imposing a mandatory duty when used to define the powers of a public official. *Michaelson* v. *United States*, 266 U. S. 42, 70; *Supervisors* v. *United States*, 4 Wall. 435, 446; *Mason* v. *Fearson*, 9 How. 248; *Galena* v. *Amy*, 5 Wall. 705; *Ritchie* v. *Franklin County*, 22 Wall. 67. In accordance with this rule the word "may" in Section 3 (a) should be so construed as to avoid any possible constitutional objection. It would seem to have been the intention and will of Congress that the President should approve codes after the necessary findings have been made, and should not arbitrarily reject codes as to which he had found all the legislative requirements to have been fulfilled. There is no suggestion that the President has ever failed to approve a code after making the necessary findings. Under such circumstances, the validity of the Act under a construction different from that actually adopted would not seem to be in issue. *Edelman* v. *Boeing Air Transport Co.*, 289 U. S. 249, 253, *Pacific Tel. & Tel. Co.* v. *Seattle*, 291 U. S. 300, 304.

approve codes without making the findings required by Congress.

The cases discussed above are ample authority for the proposition that there is an adequate standard for the delegation contained in Section 3 (a) of the Recovery Act. The precise degree of detail with which policies are required to be described by Congress must, of course, vary with the character of the subject of regulation. This Court has made it plain in the leading decisions on the question of delegation that it will not permit the doctrine of delegation so to restrict the power of Congress as to interfere with its ability to legislate. The doctrine of delegation was intended to protect and not to destroy the power of Congress.

The leading decisions reflect the importance of practical considerations, of the necessity for the delegation as a means of administering the law, in determining how definite a standard set by Congress must be. Beginning with *Wayman* v. *Southard*, 10 Wheat. 1, this Court, speaking through Chief Justice Marshall, adverted (pp. 34–35, 46–47) to the need for flexibility in conforming the Federal practice to the judicial systems of the States in a statute delegating to the Federal judiciary power to alter the rules relating to process as the courts "in their discretion deem expedient" (p. 39). The statute upheld in *Field* v. *Clark*, 143 U. S. 649, permitted the President to impose reciprocal duties on goods imported from countries which discriminated against American products, a

function which could best be exercised by a governmental agency capable of prompt action after forming a judgment based upon changing conditions. The law sustained in *Buttfield* v. *Stranahan*, 192 U. S. 470, authorized the Secretary of the Treasury to fix standards of purity, quality, and fitness for consumption with which imported tea must comply. The Court declared (p. 496):

> Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

In upholding the statute authorizing the Secretary of War to determine whether a bridge was an "unreasonable obstruction" to navigation, the Court in *Union Bridge Co.* v. *United States*, 204 U. S. 364, emphasized the fact (p. 386) that—

> investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require National legislation from time to time.

And the Court stated (p. 387) that a denial of the right of delegation "would be 'to stop the wheels

of government' and bring about confusion, if not paralysis, in the conduct of the public business."

Similarly, in *United States* v. *Grimaud*, 220 U. S. 506, the impracticability of having Congress provide general regulations for each of the many different forest reservations was held to justify authorizing the Secretary of Agriculture to "make such rules and regulations * * * as will insure the objects" of such reservations. The Court said (p. 516):

> In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features * * *.

Again, in upholding the section of the Interstate Commerce Act which authorizes the Interstate Commerce Commission to make rules in case of car shortage, the Court declared in *Avent* v. *United States*, 266 U. S. 127 (p. 130):

> * * * the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed.

See also *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230, 245; *Mahler* v. *Eby*, 264 U. S. 32, 40; *United States* v. *Chemical Foundation*, 272 U. S. 1, 12.

The emphasis upon the practical need for the delegation is clear in *Hampton & Co.* v. *United States*, 276 U. S. 394. In upholding the Flexible

Tariff Act, which authorized the President to adjust tariff rates so that they would correspond to the differences in costs of production here and abroad, the Court took into account the inability of Congress to make the necessary adjustments (p. 405), the need for readjustment because of ever-changing conditions (p. 405) and the uncertainty as to the time when the adjustments should be made (p. 407). By way of analogy, it referred to the fixing of just and reasonable rates by the Interstate Commerce Commission stating that (p. 407):

> If Congress were to be required to fix every rate, it would be impossible to exercise the power at all.

In view of these considerations, it was held sufficient for Congress to establish a general rule declaring an "intelligible principle" (p. 406):

> In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

And finally, in the *Panama* case, this Court declared (p. 421):

> Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it

> to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.

In order to determine whether the broad delegation in the Recovery Act was justified by "common sense and the inherent necessities of the governmental co-ordination" (*Hampton & Co.* v. *United States*, 276 U. S. 394, 406), let us examine briefly the situation confronting Congress. The delegation will be found justified by the unprecedented economic chaos existing in the spring of 1933, which compelled Congress to provide for the regulation of a subject of magnitude requiring great flexibility in dealing with different conditions and diverse elements in the various industries.

(1) Even in normal times a delegation similar to that in Section 3 (a) would have been necessary if Congress was to accomplish its purpose of eliminating unfair and harmful practices from the national industrial structure. But the reasonableness of and the necessity for the delegation are particularly apparent in view of the emergency confronting Congress in the spring of 1933—a situ-

ation of which this Court has frequently taken judicial notice.

When Congress convened, the banks were closed, millions were unemployed, and business was stagnant. The nation was at the verge of panic; hope and confidence were based largely upon the belief that Congress would take immediate action. Agriculture, industry, and finance were demoralized, and measures dealing with the fundamental problems in each of these fields were deemed essential.

It was believed that the distress of industry was largely due to the excesses of competition, to competitive practices which had caused overproduction, lower and lower prices, wage cutting and unemployment. The Recovery Act was an attempt to combat these evils.

(2) To be effective, it was necessary that the Act apply to many industries, and that it become operative within a short time. This program obviously could not have been adopted in time to have been of real value if Congress had had to legislate for each industry and each detail of competitive practice.

Much more than in the case of bridges and forest reservations (compare *Union Bridge Company* v. *United States*, and *United States* v. *Grimaud*, *supra*), the attempt at detailed legislation by Congress would have taken so much of its attention and time as to have stopped "the wheels of Government." The only alternative was to establish a flexible procedure applicable generally, which

would permit both easy differentiation between industries and rapid amendment to keep pace with changing conditions and to correct the mistakes which would inevitably be made in initiating the program. In the words of this Court, "Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility" *Panama Refining Co. v. Ryan, supra*, at p. 421.

The hour and wage provisions

What has been said applies with full force to the hour and wage provisions of codes since wage cutting was generally recognized as an unfair competitive practice, as heretofore discussed. But the problem of delegation with respect to hours and wages is simplified by the expressions in the Act showing the manifest intent of Congress that codes contain maximum hour and minimum wage clauses. Section 7 (a) (3) requires every code to provide that employers will comply with the maximum hours and minimum wages approved or prescribed by the President. Section 7 (c) allows the President to prescribe limited codes of fair competition dealing only with hours and wages and labor conditions. Section 4 (b) refers to destructive wage cutting as being contrary to the policy of the Act. (See note 4, p. 123, *supra*.) And the declaration of policy in Section 1 includes, among the

objects of the statute, the increase of purchasing power, reduction and relief of unemployment, and the improvement of standards of labor.

Since the policy of Congress as to whether hour or wage provisions should be included in codes is clearly expressed, the only remaining question relates to the scope of the maximum hours and minimum wages for each type of employment in each industry. It would have been manifestly impossible for Congress to have determined the minimum wage for each class of employees, or the maximum hours of labor, since the hours and wages would necessarily vary both as between different industries and within any one industry. The power was accordingly delegated to the President, with the limitation that in approving the maximum-hour and minimum-wage provisions in the various codes, he was to be guided by the schedules submitted by the industry affected, by the policy of preventing unfair competition in the exploitation of employees, and by the policy declared in Section 1 of the Act. The action of the President in determining the maximum hours of labor and minimum wages for each occupation within the limits defined by these policies would seem to be a matter of administrative detail clearly within the authority of Congress to delegate. *United States* v. *Grimaud*, 220 U. S. 506; *Butfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Company* v. *United States*, 204 U. S. 364; *Hampton & Co.* v. *United States*, 276 U. S. 394.

B. THE PRESIDENT MADE AND STATED THE FINDINGS REQUIRED BY THE STATUTE IN APPROVING THE LIVE POULTRY CODE

Section 3 (a) of the Recovery Act requires the President to make certain findings of fact as a condition of his approval of codes. In the Executive Order of April 13, 1934 (No. 6675–A; see Appendix, pp. 23–24), approving the Live Poultry Code, the President made the findings required. The Order stated:

> I, * * * do hereby find that:
>
> 1. An application has been duly made, pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933, for my approval of a Code of Fair Competition for the Live Poultry Industry in the Metropolitan Area in and about the City of New York; and,
>
> 2. Due notice and opportunity for hearings to interested parties have been given pursuant to the provisions of the Act and regulations thereunder; and,
>
> 3. Hearings have been held upon said Code, pursuant to such notice and pursuant to the pertinent provisions of the Act and regulations thereunder; and,
>
> 4. Said Code of Fair Competition constitutes a Code of Fair Competition, as contemplated by the Act and complies in all respects with the pertinent provisions of the Act, including clauses (1) and (2) of subsection (a) of Section 3 of Title I of the Act; and,

5. It appears, after due consideration, that said Code of Fair Competition will tend to effectuate the policy of Congress as declared in Section 1 of Title I of the Act.

The Executive Order refers to separate reports, recommendations and findings submitted to the President by the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act, and these reports show that the Secretary of Agriculture and the Administrator found that the Poultry Code complied with the conditions of the Act, and recommended its approval. (See Appendix, pp. 25–33.)

Petitioners contend that the findings made by the President are insufficient because they do not recount the data which induced him to approve the Code, although the President did make the findings required by the Act. In the *Panama* case this Court did not hold that where the statute establishing a standard required certain findings as a prerequisite to the exercise of the delegated authority the President need do more than comply with the statutory requirement. The Court held only that if a statute required no findings at all, but merely laid down a general policy, it was necessary for the President to indicate by findings that he was acting in conformity with that policy. There would seem to be no statutory authority or any constitutional provision which would require the President to do more than make the findings called for by the statute.

It is submitted that the findings made by the President in his Order approving the Code comply with the requirements of Section 3 (a) of the Recovery Act and with the test laid down by this Court in the *Panama* case. There the Court held that if a statute requires no findings but establishes a policy with which Executive action must conform, the President must make findings "as to the existence of the required basis of his action * * *, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual" (293 U. S. at 431). The purpose of requiring findings is to insure that the President comply with the standards set for him by Congress after due consideration of all relevant factors. The recitals and findings in the Executive Order approving the Live Poultry Code and the reports referred to therein indicate that the code was adopted after careful consideration, and that the requirements of the statute have been fulfilled.

IV. THE REMAINING SPECIFICATIONS OF ERROR URGED BY PETITIONERS ARE WITHOUT MERIT

Petitioners urge that numerous other errors occurred. The court below found that none of these alleged errors was sufficient justification for reversal (R. 1659–1660), but as some of the errors are again raised in this Court, a brief discussion of the points so urged is included in the brief.

A. SECTION 3 (f) OF THE RECOVERY ACT IS NOT INVALID BECAUSE OF INDEFINITENESS.

Petitioners contend that Section 3 (f), which makes it a misdemeanor to violate any provision of a code of fair competition in any transaction in or affecting interstate or foreign commerce, is void for indefiniteness. It is questionable whether this contention is properly raised in view of the failure to specify it as error. *Seaboard Airline Ry.* v. *Watson*, 287 U. S. 86, 91.

There is no ambiguity as to what constitutes violation of a code provision. The only part of the definition which might be considered indefinite is that which limits the offense to violations in any transaction "in or affecting interstate or foreign commerce." The clear purpose of this provision is to restrict the penalty to cases within the commerce power of Congress.

We submit that there are two valid grounds for rejecting the charge of indefiniteness. First, there are many decisions by this Court and by the lower Federal courts defining the scope of the commerce power and the range of activities which may be controlled under that power, and a statute is not lacking in requisite definiteness if its words have received prior judicial definition and exposition. Second, such ambiguity as there may be in Section 3 (f) is only the uncertainty of the constitutional limits of regulation, and language of this kind does not render the description of an offense void for indefiniteness.

First. The decisions of this Court make it clear that the requirement of definiteness in criminal statutes is fulfilled not only by "a word of fixed meaning in itself" but also by words "made definite by statutory or judicial definition", or words with "a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 395. In *Nash* v. *United States*, 229 U. S. 373, this Court upheld an indictment under the Sherman Act charging a conspiracy in restraint of interstate trade. The defendant contended (p. 376) that *Standard Oil Company* v. *United States*, 221 U. S. 1, had established that the Sherman Act prohibited only combinations which unduly or unreasonably restrain trade, and that punishment of such a restraint involved a crime into whose definition there entered "an element of degree as to which estimates may differ." Answering the contention, this Court said (p. 377):

> But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.

In *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 460, the Court said:

> In the *Nash* case we held that the common law precedents as to what constituted undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute.

See also *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 108–111.

It is not only judicial decisions declaring the common law which give a criminal statute content and meaning; decisions growing out of constitutional or other controversies serve precisely the same purpose. In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, which held the criminal provisions of the antitrust laws of Kentucky void for indefiniteness, this Court expressed the view (pp. 219–220) that construction might "take the place of express language in a statute" and that "what seemed a defect" might "be cured by the construction given to the words by the court having final authority to declare their intent." See also *Smith* v. *Cahoon*, 283 U. S. 553, 563–564.

It should be noted that the criminal provisions of the Sherman Act involve two somewhat uncertain elements, what constitutes "undue" or "unreasonable" restraint and what constitutes restraint of "commerce among the several States", but that only the latter is present in Section 3 (f) of the Recovery Act. The frequent differences of opinion among Justices of this Court in Sherman Act cases and the complexity of the factual and legal considerations which usually enter into the

determination of these cases indicate that what constitutes an undue restraint of trade is as difficult of advance appraisement as is what constitutes a code violation in a "transaction in or affecting interstate * * * commerce." Section 3 (f) of the Recovery Act is therefore less indefinite than the penal provisions of the Sherman Act since, apart from its jurisdictional qualification, the application of Section 3 (f) is entirely clear.

Second. There are many Federal statutes defining crimes so as to restrict violations to transactions within the constitutional power of Congress. A large number of Federal crimes are so defined as to include only acts committed "upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States." (Criminal Code, secs. 272, 291–293, 296, 298–301, 306; U. S. C., title 18, secs. 451, 482–484, 487, 489–492, 497.) This limitation has been placed in the definition of the crimes to bring them within Article I, Section 8, Clause 10 of the Constitution, which grants Congress power to define and punish felonies committed on the high seas, and Article III, Section 2, which extends the Federal judicial power to all cases of "admiralty and maritime Jurisdiction." Both the phrases "on the high seas" and "within the admiralty and maritime jurisdiction of the United States" are legal expressions which have required for their definition and elucidation repeated judicial decisions. (See the cases cited in U. S. C. A., title 18, sec. 451, note 3,

and U. S. C. A., Constitution, Article III, Section 2, notes 155–158.)

The obstruction of a "navigable river or other navigable water of the United States" without the consent of the United States is made a crime (U. S. C., title 33, secs. 401, 403, 406), but the meaning of "navigable" rivers or other waters of the United States is far from certain, as applied to any particular situation, and has evoked a large body of judicial decisions. (See cases cited in U. S. C. A., title 33, sec. 1, notes 1, 7, 8.)

Another statute dependent upon judicial construction to give it intelligible meaning is that which penalizes a conspiracy to injure or threaten any citizen "in the free exercise or enjoyment of any right of privilege secured to him by the Constitution or laws of the United States." (U. S. C., title 18, sec. 51.) The constitutionality of this penal provision has been upheld. *Motes* v. *United States,* 178 U. S. 458, 462.

Long practice as well as court decisions would seem to set at rest any doubt as to the constitutionality of these Federal crimes. Their qualifying language was employed in order to limit their application to situations within Federal power, and it has also been given meaning by judicial decisions. Without these qualifying expressions, the statutes would be subject to one of two alternative infirmities. If held to be separable, the courts would be obliged to limit their application to transactions

with which Congress might properly deal and the legislation might fall as too indefinite (*Smith* v. *Cahoon*, 283 U. S. 553, 564–565, *supra*); if held to be inseparable, they would be invalid in their entirety (*Trademark Cases*, 100 U. S. 82). As long as the power of Congress to create crimes is limited, as our constitutional system limits it, to particular fields, any attempt at a comprehensive exercise of the power in a given field must be framed in language which necessarily is little more definite than the field itself. It would be paradoxical if use of such language would have the effect of rendering a statute invalid.

None of the cases in which this Court has held criminal provisions invalid for indefiniteness were cases where, as here, there was a large body of judicial precedents serving to clarify the meaning of the terms of the statute or where, as here, qualifying words were used to confine the statute to the limits of an express constitutional power. See *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221, *supra* (combinations for the purpose of fixing a price that was greater or less than the "real value" of the article); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 86 (sale of commodities for an "unjust or unreasonable" price); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 455–456, *supra* (combination in restraint of trade unless for the purpose of obtaining "a reasonable profit" which could not be obtained except by marketing the products under such a combination); *Con-*

nally v. *General Construction Co.*, 269 U. S. 385, 388, *supra* (paying less than "the current rate of per diem wages in the locality where the work is performed"); *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 242 (producing crude oil in such a manner as to constitute "waste", including "economic waste" and waste incident to production "in excess of transportation or marketing facilities or reasonable market demands").

Smith v. *Cahoon*, 283 U. S. 553, *supra*, involved a statute, enforceable by criminal penalties, comprehensively regulating all motor vehicles used in transporting persons or property for compensation. This Court held the statute violative of due process as applied to private carriers for hire. It also held (pp. 563–565) that if the statutory requirements which could be constitutionally applied to private carriers were treated as separable from those which could not be constitutionally so applied, the statute would be void as to them because of failing to define their obligations "with the fair degree of certainty required of criminal statutes." This situation is clearly distinguishable from the present case where language which has received judicial interpretation limits criminal liability to acts within the regulatory power of Congress.

B. THE INDICTMENT IS NOT DEFECTIVE

1. THE CHARGES ARE NOT TOO VAGUE OR GENERAL TO BE PLEADED AS RES ADJUDICATA

The only assignment of error which purports to deal with this subject is assignment No. 1, which

merely asserts that the court erred in overruling the demurrer as to the various counts "on the grounds stated in the demurrer" (R. 1624). The demurrer alleges that the "indictment is too general, vague, indefinite, and uncertain" to be pleaded as *res adjudicata* or former jeopardy, or to enable petitioners to prepare their defense (Pars. 2, 5; R. 126).

It is not suggested either in the demurrer, the assignments of error, or the specifications, in what particulars the charges of the indictment are defective in this respect. A mere reading of the indictment reveals that the pleader has chosen to set forth the offenses with great precision and in more detail than might be required.

The conspiracy count (Count 1) sets forth the relationship of the petitioners, and alleges that they "combined, agreed, confederated and conspired with each other" to commit nine fully described offenses against the Recovery Act and the Code (R. 47–49). It then sets forth in detail twenty successive overt acts committed by designated defendants in furtherance of the objects of the conspiracy (R. 50–56).

The form of the conspiracy charge used in this case has repeatedly been held sufficient. *Joplin Mercantile Company* v. *United States*, 236 U. S. 531, 534; *Thornton* v. *United States*, 2 F. (2d) 561, affirmed 271 U. S. 414.

The offenses charged in the substantive counts are set forth in ample detail. The precise viola-

tion, the date, place, and circumstances are described in each instance.

2. THE INDICTMENT SUFFICIENTLY SETS FORTH THE INTERSTATE COMMERCE INVOLVED AND THE EFFECT OF THE VIOLATIONS UPON SUCH COMMERCE

Paragraphs 2, 3, 4, and 5 of the indictment set forth in detail the movement of poultry from 38 states to commission men, marketmen, and retailers in New York (R. 43-45). These allegations are incorporated by reference in each of the substantive counts.

As to Counts 1 and 4, it is alleged that the defendants themselves transported poultry from Philadelphia to their wholesale slaughterhouse markets in Brooklyn, New York, and there sold the poultry without inspection while it was still moving in interstate commerce (R. 51, 57, 66-67, 68).

Each count sets forth the manner in which the specific violations affect and burden interstate commerce. For example, Count 2, charging the sale of unfit poultry, alleges that such sale causes the transportation in interstate commerce of unfit poultry, which poultry would otherwise be destroyed prior to interstate shipment, diminishes the interstate transportation of healthy and edible poultry, encourages and causes the sale of unfit poultry by other slaughterhouse men, causes misrepresentations as to the edibility of poultry, demoralizes the market value of healthy poultry, confuses the orderly marketing of live poultry

through the channels of interstate commerce, reduces substantially the price paid to interstate shippers, diminishes the consumption of live poultry in New York, reduces the volume of live poultry shipped to New York from other states, and, by causing the interstate shipment of diseased poultry, causes damage and infection to healthy poultry moving in interstate commerce (R. 63–65).

The allegations respecting the effect upon interstate commerce of each of the other violations are set forth in the same detail.

3. COUNT 38 CHARGES A VIOLATION OF THE CODE

Petitioners urge that Count 38, alleging that the defendants submitted false and fictitious reports, is demurrable because such a charge does not state a violation of the Code provision requiring the filing of reports. We submit that the District Judge correctly ruled that "the making of a false report is not a compliance with the requirement" of making a report (R. 161).

4. THE TRIAL COURT PROPERLY TOOK JUDICIAL NOTICE OF THE NEW YORK ORDINANCES AND REGULATIONS

Petitioners urge that the demurrer should have been sustained as to Counts 4, 5, and 60, because the ordinances and regulations of the City of New York were not pleaded.

Counts 4 and 5 charge the sale of poultry not inspected in accordance with any rule, regulation, or ordinance of the City of New York in violation of Sec. 22 of Article VII of the Code (R. 66–69).

Count 60 alleges a violation of Sec. 15 of Article VII of the Code, which prohibits sale of poultry to any person not licensed to handle poultry where a license is required (R. 117–118).

Section 1172 of the Greater New York charter (N. Y. Laws, 1904, c. 628, Sec. 3), which petitioners conceded (R. 410) to be a state statute, provides that the Sanitary Code in force in the City of New York on January 1, 1902, is "binding and in force in the City of New York and shall continue to be so binding and in force, except as the same may, from time to time, be revised, altered, amended, or annulled *as herein provided.*" (Italics supplied.) It further provides that the New York City Board of Health is authorized "from time to time, *to add to and to alter, amend, or annul* any part of the said sanitary code", and to publish therein "additional provisions for the security of life and health in the city of New York." (Italics supplied.) It provides further that "the Board of Health *may embrace in said Sanitary Code* all matters and subjects to which, and so far as, the power and authority of said Department of Health extends." (Italics supplied.)

Section 1172 of the Greater New York charter further provides as follows:

> The sanitary code which is in force May first, nineteen hundred and four, shall constitute a chapter of the code of ordinances of the city of New York. On or before the fifteenth day of May, nineteen hundred and

> four, the secretary of the said board of health shall file with the city clerk such sanitary code which was in force on May first, nineteen hundred and four, and upon the filing of the same it shall become a general ordinance of the city of New York. No amendment to said code adopted by the board of health subsequent to May first, nineteen hundred and four, shall become valid and effectual until a copy of such amendment, duly certified to be a correct copy by the secretary of the board of health, be filed with the city clerk. Upon so filing, such amendment shall become a part of said sanitary code.

Section 19 of the Sanitary Code prohibits dealing in live poultry "without a permit therefor issued by the Board of Health, or otherwise than in accordance with the terms of said permit and with the regulations of said Board" (R. 1579–1580). Regulation 15 of the Board of Health requires inspection by the Inspection Service of the United States Department of Agriculture of all poultry brought into the City of New York[1] (R. 1580).

Section 1556 of the Greater New York charter (N. Y. Laws, 1917, c. 382, Sec. 1) provides that "all courts in the city shall take judicial notice of city ordinances."

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[1] It will be noted that the poultry inspection is a federal inspection, and it is therefore particularly appropriate for the Live Poultry Code to refer to the local ordinances and regulations requiring such inspection. (See Ex. 16, R. 1577–1579; Ex. 17, R. 1580.)

By virtue of the Greater New York charter provisions above quoted, Section 19 of the Sanitary Code would clearly appear to be an ordinance of the city of New York.[2] That such ordinances are judicially noticed by the courts of that state cannot be questioned. In *Greenberg* v. *Schlanger*, 229 N. Y. 120, the Court of Appeals of New York stated (p. 122):

> It is true that although the city ordinance upon which the plaintiff relies was not offered in evidence, as the case was tried in New York we may take judicial notice of it. (L. 1917, chap. 382.)

And see *People* v. *131 Boerum Street Co.*, 223 N. Y. 268, 271; *People* v. *Waldron*, 183 App. Div. 807, 811–812; *Cohen* v. *A. Goodman*, 189 App. Div. 209, 212; *Cohen* v. *Department of Health*, 61 Misc. Rep. 124.

It would seem equally clear that the provision of the Sanitary Code in question was also properly noticed by the District Court. In *Railroad Co.* v. *Bank of Ashland*, 12 Wall. 226, this Court held that a Federal Circuit Court in Indiana could take judicial notice of the private laws of Indiana (in that case the charter of a railroad company), because the Constitution of Indiana authorized the courts

[2] It is to be noted that petitioners in no way question that Section 19 was a part of the Sanitary Code and that Regulation 15 was validly promulgated and in effect. (R. 212–213, 409–411; Ex. 17.) The only objection made was that they had not been pleaded in the indictment.

of that state to take judicial notice of such laws. See *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 678; *Lamar* v. *Micou*, 114 U. S. 218, 223; *Kaye* v. *May*, 296 Fed. 450, 453.

While it is true that the regulation of the Board of Health requiring inspection is not a part of the Sanitary Code, it is to be noted that Section 19 of the Sanitary Code expressly contemplates the issuance of regulations by the Board of Health by prohibiting dealings in poultry otherwise than in accordance with the regulations of the Board. That this regulation was validly promulgated in accordance with the authority thus conferred has not been questioned. It is submitted that where an ordinance provides expressly for the promulgation of regulations, such regulations would be judicially noticed by the courts of the state, and that consequently they may also properly be noticed by a Federal District Court. Petitioners have cited no authority for the statement in their brief that such regulations would not be noticed by the state courts.[*]

There is no suggestion that petitioners were not apprised of the regulation requiring inspection.

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[*] In the analogous situation of regulations promulgated under a statute by a department of the Federal Government, this Court has held that such regulations are judicially noticed by the Federal Courts. *Caha* v. *United States*, 152 U. S. 211, 221–222; *Thornton* v. *United States*, 271 U. S. 414, 420. In the first of these cases this Court stated that "wherever, by the express language of any act of Congress,

Indeed, the petitioners testified that on some occasions they had submitted to the required inspection and on others they had not (R. 1394–1395, 1396, 1408). It is difficult to perceive in what way they have been prejudiced. If there was any defect in the pleading it would seem to be one of form which would not tend to prejudice the substantial rights of the petitioners and which, under R. S. 1025 (U. S. C., Tit. 18, Sec. 556), may be ignored.

C. THE DISTRICT COURT DID NOT ERR IN DENYING A BILL OF PARTICULARS

Most of the demands for particulars called for the specific evidence which the Government might offer in proof of its allegations. It is well established that a party may not be required to disclose his evidence in advance of the trial. *Olmstead* v. *United States*, 19 F. (2d) 842. The charges in the indictment are set forth with great particularity, and any further particulars would have served no purpose other than to entrap the Government and unnecessarily limit its proof. *Evans* v. *United States*, 153 U. S. 584.

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power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

In our discussion of the sufficiency of the indictment we have pointed out the degree of detail and definiteness with which the allegations of effect upon interstate commerce were set forth in the indictment. Petitioners have not indicated any further particulars to which they would be entitled.

D. THERE WAS SUFFICIENT EVIDENCE TO GO TO THE JURY ON EACH COUNT

Petitioners contend that there was not sufficient evidence to warrant conviction on the conspiracy charge or on certain of the substantive counts. Since this is a question of fact determined by two courts below, under the familiar rule of this Court there would seem to be no question for review here unless manifest error is shown. *Bodkin* v. *Edwards*, 255 U. S. 221

Count 1, emphasized by petitioners in the court below, charged a conspiracy "to commit a large number of offenses against the United States, to wit, to violate the said National Industrial Recovery Act and the said Code" (R. 47–49), and it set forth fully the nature of the conspiracy, alleging that petitioners conspired with each other to sell unfit and uninspected poultry, to violate the "straight killing" provision of the code, to commit acts of violence, to file false reports with the Code Supervisor, to withhold reports, to pay unlawful wages, to require employees to work ex-

cessive hours, and to obstruct the administration of the code (R. 47–49).

The court below found that this count was fully supported by the evidence. It stated (R. 1659–1660):

> Upon examination of the record it will be found that Count 1 of the indictment is amply supported. It warrants the conclusion that there was a concerted and deliberate plan on the part of the appellants to engage in the practice of selling poultry unfit for human consumption—to conceal such sales from the Code Authority, and to violate the other substantive Counts of the indictment for which they have been found guilty—sales of unfit poultry; sales of uninspected poultry; violation of straight killing; failure to make sales reports; sales to persons not licensed.

The record contains substantial evidence of a concerted plan on the part of petitioners to sell uninspected poultry. There is evidence that petitioners brought in uninspected poultry from Philadelphia (R. 619, 817, 917–918, 1009–1011); that an inspector of the New York City Health Department was misled by petitioners as to the destination of this poultry and was falsely told that it would be inspected (R. 832–833, 919–921); and that petitioners deceptively used for this poultry an inspection slip which they had received for entirely different poultry (R. 619, 621, 624, 921–922,

1577). There is also substantial evidence of a deliberate and concerted plan on the part of petitioners to sell unfit poultry and to conceal such sales from the Code Authority. The record shows a constant practice of selling unfit poultry (R. 679, 853, 858–860, 926, 928); the taking of great precautions to conceal such sales (R. 930–938, 860–863, 869–870, 926, 630–632), including threats of violence to inspectors (R. 633–635, 871–872, 1417, 605, 712–713) and resort to trickery to conceal the slaughtering and sale of unfit poultry (R. 929–937, 712–719); the slaughtering of poultry unfit for human consumption (R. 597–599, 628–629, 783, 785, 855–856, 933–934, 941–942, 715–716), and resort to the practice whereby petitioners received weight allowances from commission men in lieu of taking out and destroying the "culls" (R. 980–981, 281–282).

There is evidence that the petitioners participated regularly in the practice of violating the "straight killing" provision (R. 748, 842, 844–845), and there are a number of admissions by petitioners that they violated this provision (R. 679, 713, 788). There is evidence also of a deliberate and concerted plan on the part of the petitioners to violate the code by the submission of false weekly reports and by withholding reports (R. 785–786, 1058–1059, 1041–1042). Petitioners boasted freely of their defiance of the code and of their intention to violate its provisions (R. 636, 874–875, 511, 527, 529, 679.)[4]

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[4] Ample proof of the substantive counts charged will be found in the following pages: Count 2 (sale of unfit poultry):

E. THE TRIAL COURT DID NOT ERR IN THE EXCLUSION OF EVIDENCE

Specification No. 19 asserts that the trial court erred "in refusing to permit witnesses to testify as to the reasonableness of some of the Code provisions." This specification appears to be covered only partially by assignment No. 53, which assigns as error the refusal of the court "to permit witnesses to testify as to the reasonableness of the Code requiring regulation *straight killing*" (Italics supplied) (R. 1640).

This question arises in connection with the direct examination of David Pack, who testified that he had worked as an inspector for the Code Authority for one week (R. 1222). Pack was asked what he saw on one occasion when he visited the Schechter market on East 52nd Street (R. 1224). Peti-

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R. 679, 707–710, 714–718, 767–768, 948–949, 597–599, 602–603, 631–632, Ex. 27; Counts 4 and 5 (sale of uninspected poultry): R. 649–650, 614–623, 623–624, 625–626, 661–662, 826, 827–828, 829–835, 836–837, 913–915, 916–922, 954, 987, 991–992, 999–1000, 1001, 1047–1048, 1009–1011, 1049, 1050, Ex. 15; Counts 24 to 33, inclusive (violations of "straight killing"): R. 674, 702–707, 710–712, 714–718, 733–734, 758, 759, 842–843, 946–948, 848–850, 863–864, 844–847, 850–852, 679, 776, 777–779, 877–878, 879; Counts 38 and 39 (sales reports): R. 785–787, 1047, 1058, 1041–1042, Exs. 29, 30, 36; Count 46 (wages): R. 1033, 1018–1033, 1036, 1039, Ex. 37; Count 55 (hours): R. 1018–1033, 1036, 1331–1332, 1346, Ex. 37; Count 60 (sales to persons not licensed): R. 596–597, 614–615, 676–677, 768–769, Exs. 17, 31, 36, 40.

tioners' counsel had announced that he intended to show that certain code provisions were "unreasonable and for that reason unconstitutional" (R. 1222). The trial judge stated that that question was not before the jury. Counsel then said, "I ask you for an exception, and I will abide by your Honor's ruling." The judge did not make a blanket ruling as to future offers of evidence, but said (R. 1222–1223):

> *You ask the questions and then there will be an objection and I will rule.* Now what you want to do is, you want to offer evidence to show that some provisions of the Code are unreasonable.
>
> Mr. Jacob Heller: That is correct.
>
> The Court: I will not allow you to show it. You can have an exception to my ruling. The question is not before us; the question before us, that you may present, is whether or not it affects interstate commerce, but we are not dealing with the reasonableness of the regulations which it was conceded was enacted in pursuance of the Statute. (Italics supplied.)

However, despite the suggestion of the court that counsel ask questions upon which the court would rule, no offers of proof as to reasonableness were made thereafter. There was an objection to counsel's questions as to what witness Pack saw at the Schechter market on the occasion when he was sent

there. The court stated: "Because they kill properly on some occasions would not be evidence that they did not kill improperly on another." Counsel then abandoned his examination without taking an exception, merely stating: "In this event, your Honor, we will withdraw the witness, as long as we cannot go into these matters" (R. 1224).

It does not appear from the questions asked by counsel that he was inquiring into the reasonableness of the "straight killing" provision or any other provision of the Code. His questions indicated an intent to elicit evidence to the effect that the Schechters were abiding by the "straight killing" provision on a particular occasion when Pack visited the market, that occasion not being one of those as to which the petitioners were charged with violations.

On two previous occasions, when counsel stated that he proposed to show that the "straight killing" provision was unreasonable and inquired of the witnesses as to the enforceability of "straight killing" (R. 794–5, 1206–7), the trial judge merely pointed out that such proof did not tend to show whether "straight killing" was reasonable or unreasonable (R. 794). Counsel took no exception in either case, and in the latter case he was allowed to proceed with an examination apparently designed to show that "straight killing" was un-

reasonable because it had no effect upon price or upon interstate commerce (R. 1207).*

F. THE TRIAL COURT DID NOT ERR IN READING THE INDICTMENT TO THE JURY

The trial judge, at the commencement of his charge, read to the jurors all of the first count of the indictment (R. 1484–1506). The judge did not read the other counts but merely summarized them, explaining wherein they differed from the conspiracy count (R. 1512–1528). Before reading the indictment, the court stated, "This indictment is but a charge; it is a method whereby the defendants are placed upon trial. Guilt cannot be found simply because an indictment is presented. Guilt, if found, must be found as the result of proof offered on the trial" (R. 1484). It is difficult to see wherein petitioners can complain of this action by the court. The reading of an indictment to the jury has been held not prejudicial even when done by a prosecutor at the beginning of trial. *State* v. *Brown*, 62 S. W. (2nd) 426 (Mo.). The practice of reading the first count of an indictment in full and then explaining the differences between the count read and the remaining counts was approved in *Gallot* v. *United States*, 87 Fed. 446, 451, certiorari denied, 171 U. S. 689.

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* Petitioners were permitted to introduce a great deal of evidence designed to show that the Code provisions bore no reasonable relation to interstate commerce (R. 1088–1089, 1093, 1096–1097, 1156–1159, 1180, 1182–1183, 1186, 1202–1203, 1207–1208, 1219–1220, 1236–1237, 1243–1244, 1267, 1271–1272).

4. THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY

The principal contention urged by petitioners in this respect is that the court did not adequately instruct the jury as to the meaning of effect upon interstate commerce. Petitioners' entire objection to that portion of the charge was as follows (R. 1541-1542): . . . . .

> Mr. Heller: May it please your Honor, I except to so much of your charge as does not adequately explain to the jury what is meant by affecting interstate commerce. I ask your Honor to charge that the indictment as you read it states that the defendants' conduct in each particular count alleged, tended to and did diminish the total volume or value of the commerce that comes into the State, that their particular conduct disrupted the orderly flow thereof and diminished and demoralized the character thereof, and unless the jury finds that their conduct did such a thing, their act did not affect interstate commerce.
>
> The Court: I have already charged them. I read it at great length, the whole indictment. I told them that the charge in the indictment is what the Government is required to prove and asked the jury to determine whether the Government has proved its case. I am not going to charge separate parts. I made that charge plain and distinct, and I think the jury understood it. I read the whole of the first count, too.

Mr. Heller: Exception. And I ask your Honor to charge that what I just said applies to each particular count separately; they must be considered separate and apart.

The Court: I have already charged them at very great length. Each count, of course, depends upon the acts affecting interstate commerce. I find no necessity for further charging the jury.

It is settled "that objections to the charge of a trial judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis of error proceedings." *Pennsylvania Railroad Company* v. *Minds*, 250 U. S. 368, 375. See *Beaver* v. *Taylor et al.*, 93 U. S. 46, 55; *Guerini Stone Company* v. *Carlin Construction Company*, 248 U. S. 334, 348; *Jacobs* v. *Southern Railroad*, 241 U. S. 229, 236–237. The exception of petitioners' counsel "to so much of your charge as does not adequately explain to the jury what is meant by affecting interstate commerce" was manifestly not sufficient to apprise the trial court in what particulars the charge as given was claimed to be erroneous or deficient. It is apparent that the only specific request made on this subject (and consequently the only matter properly raised here) was based upon the contention that the particular conduct of the petitioners, as distinguished from the practice generally, must be shown to have "disrupted the orderly flow" of interstate commerce, and "diminished and demoralized the character thereof."

We submit that this contention is based upon an erroneous construction of Section 3 (f) of the Act. As previously stated, this section provides that when a code of fair competition has been approved by the President "any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce" shall be a misdemeanor punishable by a fine of $500.00 for each offense. It is submitted that neither the commerce clause of the Constitution nor the language of this provision placed the burden upon the Government of establishing that the particular acts of the petitioners, as distinguished from the general practice of which they form a part, affected interstate commerce.

A class of transactions may be regulated under the commerce power although single transactions within the class, considered individually, are not capable of producing a substantial effect upon interstate commerce. It is sufficient if the entire class of transactions produces a substantial effect. Any other doctrine would render the Federal power nugatory since practices can be regulated only as they manifest themselves in particular acts. "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce, is within the regulatory power of Congress under the commerce clause." *Stafford* v. *Wallace*, 258 U. S. 495, 521. In *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 408, the Court said that if Congress deems "certain recurring practices, though not

really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint."

United States v. *Ferger*, 250 U. S. 199, illustrates the principle. The forgery of 12 fictitious bills of lading, unrelated to any actual shipments, could not substantially affect interstate commerce. The application of the statute to the defendant was held to be within commerce power, not upon any such untenable ground, but because a *general practice* of forging interstate bills of lading would burden interstate commerce by casting doubt on genuine bills (pp. 203–205). The test of the power of Congress as laid down by the Court (p. 203) was the relation of the subject regulated to commerce and "its effect upon it." In *Board of Trade* v. *Olsen*, 262 U. S. 1, 40, this Court, in sustaining Federal regulation of trading in grain futures, said: "Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it." Yet no single sale could substantially affect the country-wide price.

The Federal Government may thus control practices which individually do not substantially affect interstate commerce, but which by their constant recurrence threaten it with substantial injury. The phrase "any transaction in or affecting interstate commerce", when used in legislation of a comprehensive character enacted under the commerce power, is appropriately chosen to cover (1) transactions "in" interstate commerce, (2) transactions

which in themselves substantially affect this commerce, and (3) transactions which, together with others of like nature, constitute a practice which substantially affects interstate commerce. In such a statute the words "affecting interstate commerce", like the power to which they refer, are not restricted to situations in which the individual transaction substantially affects interstate commerce. They include situations in which, as in the *Ferger* and *Olsen* cases, the effect of the individual transaction is slight but that of the aggregate of similar transactions is substantial.

The objectives of Congress and the legislative history of the Act make it clear that the words "affecting interstate or foreign commerce" were used in this broad and customary sense. Even a cursory examination of the scope of regulation authorized by title I shows that Congress was there attempting to exercise the full limits of its commerce power. Codes of fair competition are intended to outlaw unfair competitive practices, to promote and establish standards of fair competition binding upon all members of a trade or industry subject to a code. This purpose could hardly be achieved if a penalty for violating these standards could be imposed only by showing that the particular violation itself substantially affected interstate commerce, for few individual violations alone would have this effect.

Under Section 3 (f) each day a violation continues is a separate offense. Seldom would it be possible to establish that the wage rate paid to a

particular employee on a particular day or that the number of hours a particular employee was required to work in a given week was in a transaction "in" interstate commerce or was one which would by itself substantially affect interstate commerce. Violation of the important wage and hour provisions of codes would therefore be practically immune from penalty if Section 3 (f) were construed to mean that the individual violation either must be in interstate commerce or must itself substantially affect that commerce.

That it was the intention of Congress to include within Section 3 (f) every code violation within reach of the commerce power * is substantiated by

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* In the original bill (H. R. 5664) the penal provision was incorporated as part of Section 3 (b). It read:

"A violation of any provision of any such code shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense." (Hearings before House Ways and Means Committee on H. R. 5664, 73d Cong., 1st Sess., p. 2.)

The Senate Finance Committee in reporting the bill recommended that the above sentence be deleted from Section 3 (b) and that Section 3 (f) in its present form be added as a new section. The Committee's report said briefly:

"The provision in Section 3 (b) making a violation of any provision of a code of fair competition a misdemeanor has been retained in a modified form as Section 3 (f)." (Sen. Rep. No. 114, 73d Cong., 1st Sess., p. 2.)

And the two Committee amendments to carry out this change were adopted without further explanation and without debate. (Cong. Rec., vol. 77, pt. 6, pp. 5234, 5255.)

Since the original penalty provision would have applied to every code violation within reach of the commerce power

the statement of Senator Wagner when called upon by the Chairman of the Senate Finance Committee to explain to the Senate the provisions of the bill (Cong. Rec., vol. 77, pt. 5, pp. 5151–5152). Senator Wagner in the course of his explanatory statement said (*Id.*, p. 5154):

> The question of the proper exercise of Federal authority depends upon whether the bill confines itself to national matters or whether it attempts to extend to matters which are of purely local concern. The answer is clear. The language of the bill expressly provides that any compulsory measures, such as the licensing feature of the bill, and any penalties for violation of the codes, shall be confined to *business in or affecting interstate commerce.* Thus no attempt is made to extend Federal action to an area of activity not covered by the commerce clause of the Constitution. (Italics supplied.)

Indeed it would be absurd to suppose that, under the Recovery Act and the conditions leading thereto, Congress assumed to exercise less than its full constitutional power.

It is submitted, therefore, that the trial court's refusal to charge that the particular acts of petitioners must be shown to have affected interstate commerce was entirely proper. Petitioners' failure

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and since the one substituted therefor was treated as a change in form rather than in substance, it is clear that the lawmakers believed and intended that Section 3 (f) would and should have substantially the same meaning and effect.

to raise any other specific objections to the court's charge as to effect on interstate commerce, or to request additional charges on that subject, forecloses them from raising new objections on appeal. But even if it be assumed that the entire scope of the court's charge in this respect is in issue here, a brief examination of the charge will indicate that it was both proper and adequate.

The jury was instructed that the Government had the burden of proving beyond a reasonable doubt each element necessary to constitute the crime charged, and that a necessary element of the offense charged in each count was that the prohibited acts must affect interstate commerce[1] (R. 1484, 1511–1512, 1530–1531, 1541–1542, 1507). The court also charged that "the violations must have been substantial and not merely incidental" (R. 1532).

The court further instructed the jury that they must find whether, on the evidence, the violations charged "affected interstate commerce in any of the ways alleged in the indictment" (R. 1532).

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[1] The court instructed the jury in the language of the statute (R. 1529–1530), and even if it had not amplified its charge, this would have been sufficient in the absence of a proper request. See *Baugh* v. *United States*, 27 F. (2d) 257, 261, certiorari denied 278 U. S. 639, where the court said: "The court did repeatedly instruct substantially in the language of the statute, and upon the record we do not deem it necessary to determine to what extent a proper request would have imposed the duty of amplification." See also *Allis* v. *United States*, 155 U. S. 117, 122–123.

The first count of the indictment had previously been read to the jury. The indictment alleged that the violations and the transactions in which they occurred affected commerce in certain specific ways, as, for example, by demoralizing the price structure of the industry, diverting shipments of poultry, and causing a disruption of the flow of interstate commerce. (These allegations with reference to the first count are at R. 57–61. Similar allegations were made respecting each of the other counts.) In view of the instruction to the jury to find whether interstate commerce was affected "in any of the ways alleged in the indictment" and of the specific character of the allegations of the indictment as to what was meant by affecting interstate commerce, it is submitted that there is no merit in petitioners' contention that the jury was not adequately instructed on that subject.

II. THE VERDICT ON THE CONSPIRACY COUNT WAS CLEARLY UNANIMOUS

Petitioners' brief suggests that the jury's verdict on the conspiracy count was not unanimous, because, upon the polling of the jury, juror No. 9 stated that the jury "found him guilty on one section" of the conspiracy count (R. 1551). The trial judge thereupon properly inquired whether the jury had or had not agreed upon a verdict as to Count 1. The foreman replied, "We have agreed guilty on Count 1" (R. 1551). The court then

asked juror No. 9 whether he had agreed or not, and he replied, "We have agreed" (R. 1552). He definitely stated that his verdict was guilty on the first count (R. 1552). Juror No. 7 then said, "If he is guilty on this charge (i), does that consider the entire ————————." The court properly replied, "The count is presented. You said you agreed upon a verdict. Now, if you have not agreed on it, and you have agreed on the others, we will send you back on that" (R. 1552). Each of the jurors then agreed with the verdict as given, and in order to make certain that neither juror No. 7 nor juror No. 9 was in disagreement, the court again asked them specifically whether their verdict was guilty on the first count. Juror No. 9 answered, "Correct", and juror No. 7 answered "Yes, sir" (R. 1553, 1554). There can be no doubt that the confusion was entirely removed. Even petitioners' counsel apparently was satisfied, for he did not object or request any further polling of the jury (R. 1553, 1554).

I. THE TRIAL COURT DID NOT IMPOSE EXCESSIVE FINES OR INFLICT CRUEL OR UNUSUAL PUNISHMENT

In their specification of errors petitioners assert that the law which is claimed to have been violated is unconstitutional in that it imposes excessive fines, and inflicts cruel and unusual punishment, in violation of the Eighth Amendment. No assignment of error specifically covers this subject. (See

assignments 1 and 8, R. 1624, 1626.) Furthermore, no exceptions were taken to the sentences imposed (R. 1555–1556).

Total fines of $7,425.00 were imposed. Of this, $2,550.00 was imposed under the conspiracy count, and $4,875.00 under the substantive counts. No defendant was fined more than $100 on any one of the substantive counts (R. 1555–1556). Such fines cannot be deemed excessive, particularly in view of the aggravated circumstances of the offenses committed.

Nor can the provisions of the Recovery Act be considered unreasonable. Section 3(f) provides:

> When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than *$500 for each offense*, and each day such violation continues shall be deemed a separate offense. (Italics supplied.)

This provision is modeled after a series of penalty statutes, the validity of which has been upheld. See *Badders* v. *United States*, 240 U. S. 391; *Gulf C. & S. F. R. Co.* v. *Texas*, 246 U. S. 58; *Waters Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *United States* v. *Clyde Steamship Co.*, 36 F. (2d) 691, certiorari denied, 281 U. S. 744.

CONCLUSION

It is respectfully submitted that the judgment below, in so far as it reversed the judgment of the trial court on Counts 46 and 55 relating to minimum wage and maximum hours of labor provisions, should be reversed; and should be affirmed as to the remaining counts.

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